IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

STANDARD SANITARY MANUFACTURING COMPANY, a Corporation,
Appellant,

v.

MOMSEN-DUNNEGAN-RYAN COMPANY, a Corporation; PRATT-GILBERT HARDWARE COMPANY, a Corporation; UNION OIL COMPANY OF ARIZONA, a Corporation; PHOENIX PLUMBING AND HEATING COMPANY, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, Copartners; LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, as Individuals; WILLIAM L. HART, as Trustee in Bankruptcy of the Phoenix Plumbing and Heating Company, a Copartnership Composed of LEO FRANCIS, LYON FRANCIS and D. L. FRANCIS, copartners, Bankrupts, and CRANE COMPANY, a Corporation,
Appellees.

No. 6416

BRIEF OF APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

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THE MANUFACTURING STATIONERS INC. PHOENIX, ARIZONA

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NATURE OF THE CASE

This is an appeal sought to be prosecuted, not from an Order of Adjudicatian of Bankruptcy, but from two Findings of Fact and one Conclusion of Law based thereon, contained in the report of the Special Master to whom a contest on the matter of adjudication of an involuntary petition in bankruptcy filed against the Phoenix Plumbing and Heating Company, a copartnership and the three individual members thereof, had been referred by the Judge of the District Court for the District of Arizona. The involuntary petition in bankruptcy joined in by Momsen-Dunnegan- Ryan Company, a corporation, Pratt-Gilbert Hardware Company, a corporation, and Union Oil Company of Arizona, a corporation, all creditors, holding unsecured claims against said copartnership, had alleged numerous Acts of Bankruptcy, consisting of preferential payments made to different creditors while debtors were insolvent and within four months preceding the filing of the petition. The appellant herein, a creditor, had intervened, filing an answer denying these acts of bankruptcy. Two of the alleged copartners had answered, denying they were partners, but admitting the insolvency, and the other alleged partner had answered admitting insolvency of the Phoenix Plumbing and Heating Company, and signifying his willingness to be adjudged a bankrupt, both individually and for the Phoenix Plumbing and Heating Company. The Special Master having made his report to the court, finding three separate Acts of Bankruptcy to have been committed, one involving a preferential payment to the appellant herein, and the other two involving preferential transfers to another creditor, after hearing exceptions to the report filed by appellant herein, the District Judge confirmed the re-

port of the Special Master in toto and made an Order of Adjudication of Bankruptcy. Within thirty days thereafter appellant petitioned the Judge of the District Court for the allowance of an appeal from the Judgment "in-so-far as the same is affected by the said objections" (referring to the Objections filed by it to the Master's Report, all referring to the alleged preferential payment found by the Master to have been made to the Standard Sanitary Manufacturing Company) and on the 10th day of June, 1930, (T. R. 34) the District Judge allowed said appeal as sought and Citation was made to the appellees herein to show cause "why the Judgment of said court overruling the Standard Sanitary Manufacturing Company's objections to the Special Master's report and the Order of Adjudication in Bankruptcy of the Phoenix Plumbing and Heating Company, in-so-far as the same is affected by the said objections should not be corrected" (Transcript, page 653).

No attempt was made by the appellant to stay the administration of the bankrupt estate, and no supersedeas bond was filed, but only a cost bond (Transcript, page 638). No application for allowance of an appeal was made to the Circuit Court of Appeals and no order allowing appeal has been made by this court.

As to the two Acts of Bankruptcy found by the Special Master to have been committed by the bankrupts involving preferential transfers within the four months' period to a creditor other than the appellant herein, the appellant has assigned no errors, (Transcript, page 628) but on the contrary has filed in this Appeal stipulation as to the Scope of this Appeal in which appellant has admitted and stipulated as to such Acts of Bankruptcy, that they were "sustained by competent evidence free

from all legal objections". (See Stipulation in Brief of Appellee's Motion to Dismiss or Affirm, pages 2-4).

In its brief filed herein, the appellant has referred to this stipulation as limiting the Scope of the Appeal prosecuted to the two Findings in the Special Master's report involving the preferential payment to appellant, and the one Conclusion of Law in said Special Master's report based thereon, and has reiterated that no appeal has ever been sought from the Order of Adjudication of Bankruptcy as of the date of the filing of the involuntary petition, and the only relief asked for is a "declaration" of this court that the payment made to this appellant within the four month period prior to said date, was "not a preferential payment and not an act of Bankruptcy."

This appeal is, therefore, limited to a question of the review by this court of the correctness of certain Findings of the Special Master, which were confirmed by the District Court when it confirmed the Master's report as a whole without attempting to disturb the confirmation of said Master's Report as covering other acts of Bankruptcy and without disturbing the Order of Adjudication based thereon.

Petition for appeal (T. R. 627);
Citation on appeal (T. R. 653);
Brief of appellees (page 7-8);
Stipulation as to Scope of Appeal.

(Appellees' Brief on Motion to Dismiss or Affirm, pages 2-4; Original filed in this court.)

ISSUES

The question raised by the Assignments of Error of Appellant herein is the correctness of the ruling of the District Court confirming two Findings of Fact and one Conclusion of Law based thereon contained in the Report of the Special Master, all relating to one transaction between Appellant and Bankrupts which the Master found to have constituted one Act of Bankruptcy and the issues to be determined thereunder are:

I. Can this appeal, conceded to be limited to a review of part of a judgment only, as same relates to one transaction found to be an Act of Bankruptcy and not affecting the Adjudication of Bankruptcy and the Findings on other Acts of Bankruptcy, be prosecuted under the provisions of Section 25 of the Bankruptcy Act?

II. In view of the fact that two Acts of Bankruptcy (Master's Findings Nos. 14 and 15, T. R. P. 22) not appealed from are conceded by Appellant to be sustained by competent evidence and no appeal being taken from the decree of Adjudication, does the correctness of the Findings respecting a third Act of Bankruptcy present any present controversy to this court for determination?

III. Did the evidence sustain the Master's Findings Nos. 5 and 16 establishing an Act of Bankruptcy respecting the transaction with appellant, in

a—Were bankrupts insolvent at the time of the transfer?

b—Did bankrupts have knowledge of their insolvency?

c—Did the transfer give appellant a larger proportion of the assets than other creditors of same class would receive?

d—Was transfer of $13,000.00 to appellant made within four months' period?

IV. Were the Findings of Facts Nos. 5 and 16 sufficient to justify the Master's Conclusion of Law No. 4?

STATEMENT OF FACTS

The appellees herein cannot and do not accept the statement of facts set up in appellant's brief as correct in any respect. So totally erroneous, misleading and confusing is it, that it is impossible to amend same, and appellees therefore present what they deem a complete and correct statements of facts, verified by references to the record, as follows:

At the time of the filing of the petition in bankruptcy, the liabilities of the bankrupts, amounted to $70,-571.59. According to the schedules filed by Leo Francis (T. R. 333) the assets consisted of:

Plumbing fixtures and supplies (T. R. 364)	$2,117.20
Household goods	50.00
Motor vehicles	400.00
Machinery and tools (T. R. 134)	177.30
Debts due on open account, nominal value $3,724.24, actual value not over 10% of such amount	372.42
Total	$3,176.92

Then there are what they have called "unliquidated claims" amounting to $35,658.79 (T. R. 135). These "unliquidated claims" are principally amounts claimed to be due upon unfinished contracts and are liabilities instead of assets, because contracts taken at too low a

price and consequent failure of the bankrupts to complete their contracts. These buildings and contracts therefor have been taken over for completion by various bonding companies (See T. R. pages 125, 126 and 127). Among these claims, which are listed as assets but which are liabilities, are claims against the following:

City of Phoenix (job taken over by Southern Surety Co., bondsmen for completion)	$ 8,707.85
Green & Hall, Schwentker residence (job taken over by Massachusetts Bonding Company)	1,334.00
Phoenix Union High School District (taken over by Massachusetts Bonding Company)	3,507.10
Phoenix Union High School District, Junior College job (an uncompleted job)	2,106.00
Phoenix Union High School District, Library and Class Room Building (job taken over by American Bonding Company for completion)	9,410.12
Total	$25,065.07 (T. R. 125)

So that the total available assets at the time of the filing of the petition in bankruptcy amounted to only $13,-770.64, and of this amount a large portion is uncollectible. This is based on the schedules filed on behalf of the Phoenix Plumbing and Heating Company and Leo Francis (see T. R. page 125 entitled "Unliquidated

Claims"). In addition to these is the Baschowitz claim which is a total of either $2,600.00 or $3,700.00 (T. R. 323).

The business of the bankrupts was in operation for a period of about twenty-three months, from October, 1927 to August 17, 1929 (T. R. 365 and page 4), and the total loss for said period was in excess of $56,800.95, and on August 17th, 1928, their assets exceeded their liabilities by that amount.

The three bankrupts came to Phoenix in the latter part of 1927 (T. R. 365, 429). At that time they had a cash capital of not more than $1,000.00 (T. R. 357, 365), of which $800.00 was contributed by Leo Francis, (T. R. 352); possibly Lyon Francis contributed $200.00 more. After D. L. Francis came to Phoenix, $1,800.00 was sent to him by Leo (T. R. 352), who had borrowed $1100.00 from his father (T. R. 352). D. L. Francis then borrowed $450.00 from Joe Thomas during the month of September or early part of October (T. R. 366). D. L. Francis was drawing wages of $55.00 per week out of this capital. He started the Sunshine Plumbing Company and spent $50.00 in this venture. On the 29th day of September, 1927, they opened their bank account and placed therein their capital and borrowed money in the sum of $2,150.00 (T. R. 147, 148). The account was with the Commercial National Bank and in the name of the Sunshine Plumbing Company.

On October 5, 1927, they purchased from William Remsbottom his plumbing business for the sum of $3,600.00, plus a bonus for good will of $670.00, making a cash payment thereon of $1600.00, and leaving an indebtedness to William Remsbottom of $2,670.00 (T. R.

366, 367, 368, and financial statement T. R. 85). All their capital was exhausted and they were actually insolvent by the 10th of October, 1927, as shown by tabulation below.

Preliminary expenses (See Bank account T. R. 147)	$ 43.48
Deducted from Leo's capital prior to sending it to D. L. Francis for investment at Phoenix	100.00
Amount paid and agreed to be paid for the good will of Remsbottom business	670.00
Amount spent in Sunshine venture	50.00
Amount drawn by D. L. Francis, $45.00 per week in September and up to 10th of October	270.00
Making a total of expenditure to that date of	$1133.48

and an actual insolvency of $133.48 (T. R. 368). A true statement of their actual condition on October 15th, ten days after the purchase of the Remsbottom business was as follows:

(T. R. 367 to 369, inc.) (Financial Statement of October 15, 1927, T. R. 85 as corrected by the testimony). Assets:

Cash on hand	$ 258.54
Value of property acquired from Remsbottom	3600.00
Total assets	$3858.54

Liabilities:

To William Remsbottom	$2670.00	
To father of bankrupts	1100.00	
To Joe Thomas for money borrowed	400.00	
Total liabilities	$4170.00	
Excess of liabilities over assets		311.46
		$4170.00

On this date, October 15, 1927, they made a statement to the Commercial National Bank (T. R. 83) in which they showed a net worth of $4844.54, though actually insolvent at the time. This result was shown by padding the value of property they had acquired from Remsbottom. That which they had purchased for $3600.00, they put in this statement as of the value of $7256.00 (T. R. 84), viz:

Notes receivable	$1,056.00
Salable merchandise	3,700.00
Machinery and tools	2,500.00
	$7,256.00

Upon the liability side of their statement they omitted to list the indebtedness for money borrowed from their father of $1100.00 and the money borrowed from Joe Thomas of $800.00; so that their liabilities should have been $4570.00 instead of $2670.00 as shown thereon (T. R. 85). This statement according to their figures, shows a net gain of nearly 400% in 10 days time.

After issuing this statement, and prior to April 1928, they suffered a further loss of $3700.00 from their listed

assets (T. R. 344) in the loss upon the Bashovitch job (this while carried at $3700.00 was probably an actual loss of $2600.00). The loss was complete the moment that the material was upon the premises and the labor furnished, in that there was a first mortgage of $4700 upon the lot before the building was erected, (T. R. 151-159) which was eventually foreclosed and no recovery whatsoever was made for the debt due the bankrupts, or other contractors.

On April 2, 1928, while they were actually insolvent and their liabilities exceeded their assets in a sum of not less than $4,000 they, for the purpose of obtaining credit from the Commercial National Bank made a statement to that bank in which they showed a net worth of $12,-127.80 (T. R. 86, 87, 88). No new capital had been put in the business at that time. The indebtedness of $1100.00 to the father of bankrupts was omitted; the indebtedness of $400.00 to Joe Thomas was omitted, and the indebtedness to William Remsbottom was also omitted. If the figures they presented in this statement were correct, they had during a period of less than six months earned more than 1100% on the original capital invested. Apparently these figures were arrived at by padding the amount of salable merchandise on hand and listing as assets uncompleted contracts of $19,012.10, (T. R. 86) and on none of these contracts does there ever appear from their books, or otherwise, or in their testimony, any profits realized whatsoever. On the contrary the loss on contracts and other business for these 23 months in which they were in business, showed a loss of an amount in excess of $56,800.00. (T. R. 4 and 365). A true statement at that time would have disclosed that the bankrupts were insolvent on April 2, 1928.

On May 31, 1928, they prepared another statement of their assets and liabilities (T. R. 89, 90, 91) which on August 18, 1928, was furnished to R. G. Dun & Company. This statement showed a net worth of $15,236.55, or a profit of more than $3,000.00 in less than 60 days time. From the statement of May 31st sent to R. G. Dun & Company on August 18th, 1928, there was omitted from the liability side the indebtedness to Remsbottom, the indebtedness to the bankrupt's father and the indebtedness to Joe Thomas.

In order to show assets in excess of liabilities they listed upon the asset side of the statement an item of $14,373.00 as due on contracts (T. R. 90). This probably represents an anticipated profit which never materialized, as it does not appear that upon any of their contracts they ever made profits. They listed their hopes and expectations as cash assets while taking contracts for less than the cost of construction.

Upon the above false statement they were able to procure a good credit rating from R. G. Dun & Company (G 3) and thus incur large liabilities. (T. R. 91).

In the latter part of 1929, there was prepared by the Southwest Audit Company, of which Mr. Jerry Lee is a member, a financial statement taken from the books and records of the bankrupts, as far as the same were available, and supplemented and checked back with other public records so far as this was practicable showing condition of bankrupts as of April 30, 1929. This statement (T. R. 197, 198) shows an excess of liabilities over assets of $30,165.82. This amount was increased by the 17th of August, 1929, at the time that the second audit was made by the same firm of auditors to $43,716.06 (T. R. 196).

Complaint is made by the appellant in its brief that this audit is incorrect; but an examination of the record shows that Mr. Lee gave the benefit of the doubt in every instance to the bankrupts.

Of the uncompleted jobs on hand and which were considered assets by the bankrupts and so reported in all their statements, there was $25,065.07 that the final result shows to have been liabilities and not assets (T. R. 125 to 138).

A statement was made and furnished to the bank on June 22, 1929 (T. R. 234). This statement was prepared by Mr. Fretz, an employee of the bankrupts. It showed, if correct, a net worth of $5,718.79, but as appears from Mr. Fretz's testimony, (T. R. 361) he omitted from his statement the cost of materials and labor necessary to finish the outstanding contracts which he listed as having a value of $47,400.64. If we deduct the amount necessary to complete these contracts, which amounts to more than $18,945.00, we have the bankrupts as shown by their statements together with this correction to have been insolvent upon June 22, 1929, and their liabilities exceeded their assets by more than $13,226.21.

In the bankrupts' schedules sworn to on the 17th day of September, 1929, and which were made up to show the assets and liabilities as of August 17, 1929, the liabilities were put at $70,571.59, and the assets at $43,510.33, (T. R. 290 to 334) showing liabilities in excess of assets in the sum of $27,061.26 (T. R. 134, 135).

This is a strong confirmation of the audits made by the Southwest Audit Company on the two dates of April 2, 1929, and August 17, 1929. There should be deducted, however, from the assets in each of these audits a large sum for uncompleted contracts taken over by the bond-

ing companies. It therefore appears that the bankrupts were insolvent on:

October 10, 1927,
October 15, 1927,
April 2, 1928,
May 31, 1928,
April 30, 1929,
June 20, 1929,
July 22, 1929 and
August 17, 1929,

at which time, to-wit, August 17, 1929, creditors petition in bankruptcy was filed. And nowhere in the record do they appear to be solvent, nor does there appear in the record any transaction that shows a profit to the bankrupt firm.

About the 1st of January, 1929, if not before, the members of the bankrupt firm realized that they were in an insolvent condition and never would be able to pay their debts, and about this time they commenced to withdraw their funds from the business as rapidly as they could, paying as little as possible to their creditors. We point out a number of these withdrawals of large amount, to-wit:

January, 1929	Leo Francis	$ 400.00	(T. R. 357)
	Father of Leo Francis	700.00	(T. R. 353)
	Joe Thomas	2100.00	(T. R. 388)
	D. L. Francis		
	Arizona Garment Co.		

These last two items are very large but cannot be ascertained because of destruction of books.

That this condition became apparent also to Mr. Nihel, the manager of the appellant's business, appears also, for he commenced taking assignments of accounts and watching the business very closely, even suggesting that D. L. Francis be removed from his position as manager and Mr. Fryberger substituted, and by taking other active steps in the management of the copartnership.

The withdrawals of funds from the firm during the period from January 1, 1929 to April 22, 1929, were sufficient to break the company if it had not been insolvent prior thereto, and on this last date a convenient fire occurred; that it was of incendiary origin is shown in the testimony of the two police officers who examined the premises (T. R. 284 to 288). The fire was started with a slow fuse. The door of the safe was left unlocked and books left outside, but because the combustibles were not properly arranged for a fire, there came an explosion which blew the door off the safe and put out the fire (T. R. 284-288). Some of the books were taken away by the bookkeeper, one Gehres, prior to the explosion. Another, in a badly torn condition, is before this court, as an original exhibit. Portions of the cash book disclosing the transactions for the first four months of 1929 are missing. Between 9 and 9:30 on the night of the fire, D. L. Francis was on the premises and Paul Gehres was there at about the same time. The explosion occurred a little later that night after the candle attached to the fuse had burned down.

For some time, approximately 60 days prior to the appointment of the receiver, no deposits were made in the bank by the bankrupt firm. (T. R. 554). The bankrupts kept no books which would show their assets and liabilities; the money due the father of the bankrupts never ap-

peared on the books, nor did the money loaned from Joe Thomas. A contracts receivable book was kept which showed the amount of the contracts, but nothing was kept to show the purchases for carrying out the contracts, nor the amounts necessary to complete the various jobs. $2100.00 was paid to Thomas in March and April (T. R. 388). Check stubs from December 11, 1928 to April 13, 1929, were missing (T. R. 552). This is the critical period when the firm's cash was disappearing.

No notice was given to any of the creditors of the bankrupt of the alleged assignment of moneys due on the various contracts. (T. R. 428). Bankrupt stated to Mr. McNichol (T. R. 571) that no assignments had been made.

The Master's report finds that the bankrupt committed three acts of bankruptcy (Paragraph 14 of Master's Report, T. R. 22 and 23; Paragraph 15 of Master's Report, T. R. 23 and 24; Paragraph 16 of Master's Report, T. R. 24; these being the findings of fact). The conclusions of law to the same effect appear in Conclusions 2, 3 and 14 (T. R. 25). It is the last of these items and only one that the appeal is directed to. This last item is set up in the creditor's petition on page 8 thereof and the assignment is to the effect that at a date subsequent to June 1, 1929, and while insolvent, bankrupts transferred a portion of their property, to-wit, money in the sum of $13,000 to the appellant with intent to prefer it over other creditors. The payment was actually made to the appellant on June 9th, 1929, and appears upon the cash book of the bankrupt as of that date (T. R. 625, 626, 441, 442). On June 8th, the Lincoln Mortgage Company issued its check for $14,000.00 to the Phoenix Plumbing & Heating Co. (T. R. 599, 600 and 601). The item was

cashed by C. B. Fryberger, then manager for the Phoenix Plumbing and Heating Co. (T. R. 440). At that time the Phoenix Plumbing and Heating Company was insolvent (T. R. 197). It had been insolvent from the date of its opening business in Phoenix after the purchase of the business from William Remsbottom (T. R. 365). The total capital of the partnership, $800.00 or $1,000.00, had been used in preliminary expenses and liabilities of the partnership exceeded the assets by $30,165.82.

That the so-called assignment of contract of March 5, 1929, (Exhibit C, T. R. 236) was concealed, is shown from the fact that bankrupt, D. L. Francis, stated to the officials of the Commercial National Bank on May 14, 1929, that no assignments had been made. This was at the time that he made application for the loan of $1,000 made to the bankrupt partnership on May 15th (T. R. 279). There were various transactions with the bank during May, 1929, loans increased, which would not have been made had the fact of these assignments not been concealed from the bank, and by virtue of this deceit the bank lost the money that they lent upon the faith of the bankrupt's statement that no assignment had been made.

Another act of concealment was the sum of $14,000 collected from the Lincoln Mortgage Company, which was kept out of the regular channels of business and not deposited in the bank account. (T. R. 442, 443). On June 22nd when Nihel was present at the bank and he and the officials of the bank were figuring out conditions of the bankrupt to see whether it woud justify a further extension of credit, Nihel, Manager for the Appellant, did not mention that his firm had any assignments whatsoever (T. R. 282). Nihel further says that he knows nothing of the assignment of May 7th (T. R. 592). Nihel

does not testify that the Lincoln Mortgage Company payment of June 8th was paid on account of this assignment (T. R. 594). While the witness, Nihel, testified (T. R. 596, 597) to various assignments of November 5, 1927, December 5, 1927 and four other assignments, he does not in all his testimony indicate that a dollar was ever paid to his firm upon any assignment held by them. It further appears that the first notice as to the assignment of December 5th (T. R. 596, 597) was accepted June 23rd, 1929, on the eve of bankruptcy when it had been disclosed to all that the firm was insolvent and this is the first indication and notice of, or acceptance of any assignment. Witness Nihel never testified that he received the assignment dated March 5, 1929, nor does it appear in the evidence anywhere as to the time of its delivery (T. R. 586-599).

The payment to the Standard Sanitary Mfg. Company on June 9, 1929, of $13,000.00 (found by the Court to be an act of bankruptcy) was paid by C. B. Fryberger, then manager of the bankrupt partnership by a cashier's check of the Citizens State Bank (T. R. 442). The payment appears upon their cash book as having been made to the Standard Sanitary Manufacturing Company in the amount of $13,000.00 on June 9, 1929 (T. R. 625). To whom the payment was made does not appear. The Phoenix Plumbing and Heating Company obtained the money out of which this sum was paid from a check or voucher payable to them for $14,000.00 which was delivered to Mr. Fryberger as manager, (T. R. 442). No representative of the copartnership was with him when he received the check or when he went to the Citizens State Bank and procured a cashier's check for $13,000.00 which he subsequently paid to the appellant (T. R. 442).

At the time that he received the check and at the time that he procured the cashier's check he was in full control and custody of the checks and funds, and as far as appears from the evidence he applied the funds according to his own judgment, using $1,000.00 for the payroll of the bankrupt corporation (T. R. 442). The voucher check of the Lincoln Mortgage Company does not recite that it was paid on an assigned account and it was not made payable to the alleged assignee, but on the contrary was made payable to the bankrupt partnership; it was recited that it was in payment of various jobs named, nor does it appear that at that time or at any other time the instrument claimed to be an assignment was delivered to them at the time that the $14,000.00 was paid, or at any other time (T. R. 599 to 602).

There does not appear from the evidence to have ever been a draft drawn upon the Lincoln Mortgage Company as provided for in the alleged assignment, nor any acceptance of any such draft, nor does it appear that any delivery was made of this instrument to any officer or employee of the Standard Sanitary Manufacturing Company, other than the testimony of Dee Francis, which the Master did not believe.

Mr. Nihel, the local manager of the appellant, was upon the stand and never claimed that the payment of $13,000.00 was paid under or by virtue of the instrument, nor did he claim that it had ever been in the possession of his company, nor that he had notified the Lincoln Mortgage Company that he had the same in his possession, nor that he ever drew any drafts as provided for in the instrument (T. R. 586 to 599); nor does the instrument correspond in form with any other purported assignment that appears in the record. Mr. Nihel did testi-

fy as to certain purported assignments as to other properties dated May 7, 1929; that he had never received them, did not know anything about them, remembered no negotiations with reference to them, and knew of no reason why they should have been taken, (T. R. 592).

The testimony of the bankrupts, Leo Francis and D. Francis, conflicts in material matters (that cannot be explained upon any theory of mistake) with the testimony of the following witnesses: Floyd M. Stahl (T. R. 430), C. L. Lane (T. R. 282), Frank McNichol (T. R. 565-571); with the bonds signed by them (T. R. 80), and with the solemn instruments acknowledged by them and placed upon the records of Maricopa County (T. R. 22, Finding 12), and many other instruments signed by them as shown by the record. These were upon the matter of partnership which was a material issue in the hearing, though not now appealed from, and the bankrupt Dee Francis, testimony is in sharp conflict with that of Mr. McNichol of the Bank in regard to the alleged assignments (T. R. 571). No notice of any of these assignments was ever given to any creditor of the bankrupt and was actively concealed from the Commercial National Bank by statements made to Mr. McNichol by Dee Francis (T. R. 571). He was attempting to procure a loan from the bank which he did actually obtain from the bank. Between the dates of April 30, 1929 and August 17, 1929, there was no improvement in the condition of the affairs of the bankrupt partnership. (T. R. 510). At the time this payment was made, the bankrupts' records show them to have been in an insolvent condition, and they would have known this fact from any examination of such records. (T. R. 393). As early as March they were being pressed by other creditors (T. R. 337,

346), and in May the appellants herein were pressing them vigorously for payment. Prior to the payment of this sum of money, they had been refused further credit by the Crane Company (T. R. 579-580), who had taken assignments of a large number of their contracts and then refused to furnish them further credit. They made no deposits in the bank between June 18, 1929 and August 17, 1929. (T. R. 554).

The affairs of the bankrupts were in such condition by July 1, 1929, that conferences were being held between Messrs. Nihel, Duffy, Armstrong and Townsend in regard to making an assignment for the benefit of creditors (T. R. 608). At that time a suit was threatened by Crane Company through its attorney, Mr. Fred Blair Townsend. (T. R. 612). The assignment, however, was never completed, probably owing to the fact that the Crane Company and the appellant insisted that the alleged assignments claimed by them prior to that date, should be expressly recognized in the assignment (T. R. 609). The proposed assignment appears as Exhibit No. 37 (T. R. 613). In the investigation precipitated by this action the various instruments purporting to be assignments heretofore concealed from the creditors by the bankrupt were brought to light and precipitated the filing of the petition in bankruptcy (T. R. 612).

BRIEF OF ARGUMENT ON APPEAL

ISSUE No. I

Right of Appeal

(a) Appellant cannot appeal from a specific finding of fact or conclusion of law under Section 25 of the

Bankruptcy Act, unless it appeals at the same time from the decree of adjudication, which, in this instance, it does not do and expressly disclaims any such intention in its brief. (See page 7 thereof.)

Bankruptcy Act, Section 25.

(b) If this appeal is allowable at all, it must be under Section 24 of the Bankruptcy Act and is allowable only by the Circuit Court of Appeals, which precedure was not followed in this case.

Bankruptcy Act, Section 24.

We do not argue this at length as it is fully developed in our brief upon our Motion to Dismiss or Affirm at pages 26-31 thereof, filed in this Court. We merely renew the argument at this point, so that it may not be considered that we have waived the motions or any of the rights set up therein.

ISSUE No. II

Where two acts of bankruptcy are admitted by appellant, it cannot complain of the decree of adjudication.

An order of the District Court affirming the findings of fact and conclusions of law of a Special Master as to an act of bankruptcy, cannot be set aside on appeal where there is no attempt to set aside the decree of adjudication and it is admitted that other acts of bankruptcy found by the Special Master are sustained by competent evidence free from all legal objections, and the appellant concedes in both stipulation and brief that the adjudication shall stand.

In this matter it is conceded that the adjudication should stand and by stipulation it is agreed that the scope

of the appeal shall be limited to the findings of fact and conclusion of law in regard to one act of bankruptcy, namely, that of the preferential payment of $13,000.00 to the Standard Sanitary Manufacturing Company, the decree of adjudication to remain undisturbed.

This is in harmony with the position of the appellant from the start as shown by its Petition for Appeal, (T. R. 627) Citation on Appeal (T. R. 653), Assignments of Error (T. R. 628), Stipulation as to Scope of Appeal (Brief on Appellee's Motion to Dismiss or Affirm, pages 2-4), and Appellant's Brief on Appeal, (pages 7 and 8).

(a) An adjudication of bankruptcy warranted by proof of an act of bankruptcy sufficiently alleged, may not be set aside because other alleged acts of bankruptcy were not properly pleaded or proved.

> "Even if it be true as contended by ap ~~conclusion of law in regard to one~~ act of bankruptcy, were not properly pleaded or proved, the fact is wholly immaterial upon this appeal. It is enough that sufficient was alleged and proved to warrant the adjudication."
>
> *In re Lynan, et al.,* (U. S. Cir. Ct. of Appeals, 2nd Cir. Nov. 24, 1903) 11 A. B. R. 466; 127 Fed. 123.

(b) The acts of bankruptcy admitted to have been proven and from which no appeal has been taken are shown in the report of the Special Master on pages 22, 23 and 24 of the Transcript of Record, and the Findings of Fact, being Nos. 14 and 15, and the Conclusion of Law, being Nos. 2 and 3, are shown on pages 24 and 25 of the Transcript of Record.

ISSUE No. III

Sufficiency of evidence to sustain the Master's findings, as affirmed by the Court.

The evidence is sufficient to sustain the Master's findings No. 5 and 16, establishing an act of bankruptcy respecting the transactions with appellant in that

(a) Bankrupts were insolvent at the time of the transfer of $13,000.00 to the appellant on June 10, 1929, and within four months prior to the filing of the schedules in bankruptcy as of August 17, 1929, appears from the following facts set up in the record:

1. Schedules of Leo Francis, bankrupt, as of August 17, 1929 (T. R. 290 to 334, inclusive);
2. Financial statement prepared by Southwest Audit Company showing financial condition of bankrupt as of August 17, 1929 (T. R. 196);
3. Financial statement prepared by Southwest Audit Company showing financial condition of bankrupt as of April 30, 1929 (T. R. 197);
4. Financial statement made by bankrupt to Commercial National Bank June 22, 1929 (T. R. 234), coupled with the testimony of Mr. Fretz as to omission of liabilities (T. R. 361);
5. Admissions, on bankrupt's examination, by Leo Francis that business was started in October, 1927, with a cash capital not to exceed $1,000.00 (T. R. 357, 365), and admissions of the bankrupts that the same was exhausted in preliminary expenses and purchase of good will within ten days after opening business in October, 1927. (T. R. 352, 357, 365, 366, 367, 368);

6. Analysis of the financial transactions of the bankrupts. (See portions of our Statement of Facts shown in this Brief on pages 6-21);

7. Loss of $3,700.00 on one contract prior to April, 1928, increasing the theretofore existing insolvency (T. R. 344, 151, 159);

8. Testimony of Jerry Lee, certified public accountant contract entered into by them during the period that they were in business (T. R. 500, 501); that their records do not show a profit on a single

9. Admissions of bankrupt that creditors were pressing for money in March, 1929. (T. R. 346, 337) and May, 1929, (T. R. 418);

10. Draining of resources of bankrupt partnership by the bankrupts during a period when they are shown to be in a failing condition, namely, the period of five months preceding the incendiary fire (T. R. 388, 389), and the records of these transactions being destroyed by the incendiary fire (T. R. 285, 287).

Bankrupt having failed to produce its books showing its financial condition, the burden of proving insolvency fell upon the ~~petitioning~~ creditor.

Remington (3rd Ed.) Vol. 1, Sec. 189-190, page 256.

"Destruction or loss of adequate books or failure to keep them is no excuse if the debtor fails to appear with books and records sufficient to determine the question of his solvency or insolvency. The burden is upon him to prove his solvency." *Remington* (3rd Ed.) Vol. 1, Sec. 190.

In the case of *In Re Perlhefter and Shatz,* 25 A. B. R. 576 (177 Fed. 299), the court says:

> "On the other hand, however, I think that, even if the facts are not strictly in point the reasoning of In re West (C. C. A., 2d (Cir.), 5 Am. B. R. 734, 108 Fed. 940, 48 C. C. A. 155, controls this case. It is quite true that their solvency was an affirmative defense, while here it was a necessary allegation of the petition; but I do not believe that Congress meant an intervening creditor to be in a better position to combat adjudication than the bankrupt was, or that the petitioner's case was to become more difficult if a bankrupt absconded than if he stayed and fought. There is every reason to construe the act as putting the intervener in precisely the same position as the bankrupt, and no reason to the contrary."

See also:

Bogen & Trummell v. Protter, 12 A. B. R. 288; 129 Fed. 533;

Dummings Grocery Company v. Talley, 26 A. B. R. 484; 187 Fed. 507 (6th Cir.);

In Re Desha & Willfong, 38 A. B. R. 130;

Hollister v. Oregon Hardware Mills, 9 A. B. R. (N. S.) 137; 15 Fed. (2) 788; (citing with approval the case of Bogen v. Protter, supra).

In the case of the failure of the bankrupt to sustain the burden of proving his solvency after the shifting of the burden, the insolvency of the debtor will be presumed to have existed as of the earliest date alleged in the petition.

In Re Donnelly, 27 A. B. R. 504.

That the same rule applies as to intervenors is apparent from the citations from *Remington*, supra, and *In Re Perlhefter and Shatz*, supra.

In the following cases, proof of insolvency has been held sufficient where the evidence presented was considerably less than that shown in the Transcript of Record of the present case:

Matter of National Steamship Lines, 48 A. B. R. 356, (C. C. A. case). (A matter very much like the present case on the facts.);

Matter of Saludes Lumber Co., 47 A. B. R. 111. (Evidence held sufficient. Large number of assignments.);

Williams v. Platner, 17 A. B. R. (N. S.) 227;

Cleage v. Laidley, et al., (8th Cir.) 17 A. B. R. 598;

Reiter v. Bernstein, 1 A. B. R. (N. S.) 141; 28 Fed. 429;

Schwemer v. Milwaukee Com'l Bank, 5 A. B. R. (N. S.) 675; 201 N. W. 398;

In Re Dix, 46 A. B. R. 199, 267 Fed. 1016;

Abdo v. Townsend, 49 A. B. R. 148.

(b) The Transfer in this case gave to the appellant a much larger proportion of the assets than any other creditor of the same class will receive. This is apparent from an examination of the bankrupt's schedules wherein it is disclosed that the unsecured indebtedness amounts to a sum in excess of $22,000.00 (T. R. 134), and that the amount of available assets consist nominally of $[illegible] [illegible]ign (T. R. 135). The actual value of these assets would [illegible] less than half of that sum.

"If the effect of the transfer is to enable the creditor to receive out of the debtor's estate a larger percentage of his claim than other creditors of the same class, it constitutes a preference."

Gilbert's Collier on Bankruptcy, page 839, and cases cited therein.

As the payment of this $13,000.00 depleted of necessity the estate of the bankrupt of this amount, and no other creditor appears to have received any proportionate sum on his claim, the conclusion is inevitable that the estate was depleted to the extent of $13,000.00, and the necessary consequence thereof is that the fund to be divided among the unsecured creditors, would be lessened to that extent, and the appellant would gain therefore, a larger proportion of the assets than other creditors.

(c) The transfer by the bankrupt of said sum of $13,000.00 to appellant was with intent to prefer appellant over other creditors. The intent is always deducible from the payment of a large portion of their property by bankrupts while insolvent. The rule is laid down in *Toof v. Martin,* 13 Wall. 40, 20 Law Ed. 481, and has been followed in many cases subsequent to that time.

The intent to make a preference is presumed from payments within the four months period by a bankrupt with knowledge of his insolvency.

Eastern Drug Company v. Hanover Beiringer Drug Company, 8 Fed. (2nd) 838, 7 A. B. R. (N. S.) 163.

[illegible] transfer is prima facie with intent to prefer on the part of the bankrupt unless he can show he was at the time ignorant of his financial condition.

Toof v. Martin, 20 Law Ed. 481; 13 Wall. 40.

The insolvency of the debtor will be presumed to have existed as of the earliest date alleged in the petition where he or the intervening creditor fails to sustain the burden of proving his solvency after the shifting of the burden.

In Re Donnelly, 27 A. B. R. 504; 193 Fed. 755;
In Re Perlhefter and Shatz, 25 A. B. R. 576; 177 Fed. 299.

A bankrupt is charged with the knowledge of his own insolvency when he has the information in his own possession from which he can ascertain the fact that he was insolvent.

Morimura v. Tabeck, 279 U. S. 24.

This intent to prefer appears from the fact that the sum of $13,000.00 was not paid in the usual course of business, but a special check was procured in order that the same might not show in the bank account of the bankrupts.

(d) The transfer of $13,000.00 to appellant was made within the four months period. It was paid on June 9th or 10th, 1929, and the creditors' petition in bankruptcy was filed August 17, 1929. The above shows the affirmative evidence necessary to sustain the Master's findings as to Nos. 5 and 16, and all of the above is practically conceded by the appellant, and it seeks to avoid the effect thereof by setting up an alleged assignment as of the date of March 5, 1929, a date prior to the beginning of the four months period. In this matter the burden is upon the appellant to establish the assignment and the evidence thereof is insufficient to do so.

The evidence shows that there was no assignment in fact, in that the bankrupt retained control of the fund and received a voucher in payment thereof. (T. R. 600, 601, 602). The testimony to show the execution of the alleged assignment is unreliable in that the bankrupts have been shown to be unworthy of belief, and the execution of the instrument, including the delivery of the same rests upon the testimony of Dee Francis alone, who answered "yes" to four leading questions of the appellant (Appellant's Brief, page 14); for the instrument is not by its terms an assignment but is a power of attorney to make a draft upon the Lincoln Mortgage Company. Such an instrument, if made, is not sufficient under the statutes of Arizona to constitute an assignment unless the same is accepted in writing.

> *Revised Code of Arizona,* 1928, Sections 2429 and 2433.

Verbal acceptance of a bill of exchange requiring the drawee to pay a specified sum, but not from any particular fund, does not operate as an equitable assignment. A verbal acceptance imposes no liability on the drawee.

> *Erickson v. Inman Poulson & Co.,* 54 Pac. 949 (Oregon).

No action can be maintained on an order for the payment of money drawn on a third person and revoked by the drawer before acceptance.

> *Harlan v. Gladding McBean & Co.,* 93 Pac. 400 (Calif.).

A draft to become an assignment must be accepted in writing by the drawee under the Arizona Statute.

Revised Code of Arizona, 1928, Sections 2429-2433. Secret assignments are void.

Benedict v. Ratner, 69 Law Ed. 991, at page 997;

See also:

Smedley, et al. v. Speckman, 19 A. B. R. 695; 157 Fed. 815;

Christmas v. Russell, 14 Wall 69, 20 Law Ed. 762;

Dillon v. Barnard, 22 Law Ed. 673, at p. 677.

It was stipulated before the Master (T. R. 240) as to all the jurisdictional facts.

ISSUE No. IV

As the Findings of Fact Nos. 5 and 16 cover all the elements required to make a preferential transfer, we do not deem it necessary to make any brief of argument thereon. All other facts that might be necessary to sustain the Master's Conclusion of Law No. 4 are shown in the other findings of fact set up in his report.

ARGUMENT

Appellant in his Brief argues Assignments of Error I and II together. Assignment of Error No. II relates to the Conclusion of Law No. IV in the Special Master's Report; therefore we think it would be more logical to argue Assignments of Error No. I and III together, as they are issues of fact and relate to Findings of Fact only in relation to the Findings of the Special Master approved by the Judge, that the payment of the $13,000.00 to the Appellant was an act of Bankruptcy. The three Assignments of Error run so close together that the argument necessarily overlaps.

While the payment of the money is admitted by the Appellant, it denies that the proof is sufficient to establish the other elements of preferential transfer; therefore as to these elements we are giving considerable attention in this argument especially to the question of insolvency.

ASSIGNMENTS OF ERROR Nos. I and III.

(*Issue No. III*)

(a) *Insolvency at the time of transfer:*

Under this title in our Brief of Argument, we have briefly stated the facts which show insolvency from the beginning of the bankrupts' business up to the date of the filing of the petition in bankruptcy. We supplement that with the following:

Insolvency is shown as of the date of August 17, 1929, by bankrupt's schedules (T. R. 134, 135) disclosing:

An excess of liabilities over assets of	$27,061.26
To which should be added items called "unliquidated claims", which are liabilities and not assets	35,658.79
Making excess of liabilities over assets on August 17, 1929, as shown by bankrupt's schedules of	$62,720.03

Insolvency is shown as of the date of Aug. 17, 1929, by the statement prepared from bankrupt's books and records by Jerry Lee, certified public accountant showing, (T. R. 196):

Excess of liabilities over assets of $43,716.06
The difference being attributable to liabilities, information as to which was not accessible to the accountant at the time that he prepared his statement.

Insolvency is also shown as of the date of July 20, 1929, at the time the statement prepared by Messrs. Nihel and Fryberger, and an officer of the Bank, which statement shows (T. R. 223):

Excess of liabilities over assets of $20,436.25

Insolvency is also shown by the statement of June 20th, 1929, which was submitted to the bank by Mr. Fretz, who afterwards discovered that in this statement complete the jobs. (T. R. 361). The statement itself is shown in Transcript of Record at page 234, and would show the bankrupts to have been solvent at that date if taken by itself, but when the amounts necessary to complete the job are taken into consideration, the same as testified to by Mr. Fretz, the statement as corrected would show the bankrupts insolvent, and with the corrections their liabilities must have exceeded their assets by more than $13,226.21, and probably by a sum in excess of $20,000.00.

The bankrupts are also shown to be insolvent by the audit of the Southwest Audit Company (T. R. 197) as of the date of April 30, 1929, and at that date their liabilities exceeded their assets by $30,165.82.

Without going into detail we present in this argument figures showing that when the preliminary expenses of opening business were paid, bankrupts' liabilities exceeded their assets on:

October 10, 1927;
October 15, 1927 (T. R. 83, 84);

April 2, 1928 (T. R. 86, 87, 88);
May 31, 1928 (T. R. 89, 90, 91);
April 30, 1929;
June 20, 1929;
July 22, 1929 and
August 17, 1929.

The first assignment of error (T. R. 629) charges that the court erred in overruling the objection of the Standard Sanitary Manufacturing Co. to that portion of the Special Master's report contained in subdivision 16 of the Master's Findings of Fact, which was to the effect that on or about June 10, 1929, and within four months next preceding the filing of the petition herein, the bankrupts, while insolvent, transferred and made over to the Appellant a creditor, a portion of their property, to-wit, money in the amount of $13,000.00 with intent to prefer said creditor over their other creditors, and Appellant urges that "said finding of fact has no foundation in the evidence submitted because it appears affirmatively in the report of the evidence and by respondents' Exhibit C in evidence that Phoenix Plumbing and Heating Company did, on the 5th day of March, 1929, assign and set over to Standard Sanitary Manufacturing Company all its right, title and interest to the money owing to the Phoenix Plumbing & Heating Co. by the Lincoln Mortgage Co. on a certain contract which the Phoenix Plumbing & Heating Co. then had with the Lincoln Mortgage Co., and that assignment contained an order to the Lincoln Mortgage Co. to pay to Standard Sanitary Manufacturing Co. all of the moneys owing or to become due from the Lincoln Mortgage Co. to the Standard Sanitary Manufacturing Co." (T. R. 629, 630).

The Appellant urges that said objection, as overruled, was based on Respondents' Exhibit C in evidence, which is set forth on pages 630, 631 of the Transcript of Record.

As a further reason for sustaining the assignment of error and as a part thereof, Appellant quotes by question and answer about four pages of testimony (See pp. 631-635, inclusive, Transcript of Record), and makes the statement that all of the evidence in the record on this subject is the testimony of Cliff Fryberger, and quotes the same from the statement of evidence before the Master, which is shown on pages 631 to 635 of the Transcript as aforesaid.

At the time the payment was made, C. B. Fryberger was the Manager of the Phoenix Plumbing & Heating Co. (T. R. 438), and in reference to this transaction he testified as follows:

> * * * "The Lincoln Mortgage Company amount, $14,000, was paid by check to the Phoenix Plumbing & Heating Co. (T. R. 442). I went to the Citizens Bank and had two Cashier's checks made, one for $13,000 and one for $1,000, taken to the bank by myself. * * * I took in place thereof (referring to the $14,000 paid by the Lincoln Mortgage Co.) a check for $13,000 to the Standard Sanitary Manufacturing Co., and a check for $1,000 to the Phoenix Plumbing & Heating Co. it went through the books of the Phoenix Plumbing & Heating Co. (T. R. 442) * * *."

This witness was asked the following question: "It was a fact, was it not, that the reason it was handled this way was because that account had been assigned to the Standard Sanitary Manufacturing Co. for some time be-

fore?" The answer was "That was my understanding of it." (T. R. 443).

It appears from the testimony of the witness (T. R. 438) that he was employed by the Phoenix Plumbing & Heating Co. during June and July of 1929 as Manager, and that under a previous arrangement he had been employed during the year 1928 from September to December; so the witness had no knowledge, as appears from the record, of anything that transpired at any time other than during these two periods, and none at all of the time this instrument purports to have been signed.

The check for $14,000 was produced in court by the Lincoln Mortgage Company (See testimony of Dorothy Dorrell, T. R. 599); she was the custodian of certain checks of the Lincoln Mortgage Co.; the check is reproduced on pages 600, 601 of the Transcript, is dated June 8, 1929, and is payable to the order of the Phoenix Plumbing & Heating Co. for $14,000, and is drawn on the Citizens State Bank of Phoenix, Arizona.

On page 601 of the Transcript appears an endorsement on the back of the check, showing what the payment was for and it recites "payment in full for plumbing on following jobs" and then is recited all the different jobs included therein and the amount that was due upon each. Not only was the check not payable to the Appellant, but it was paid and delivered to the Manager of the bankrupt partnership, Mr. Fryberger (T. R. 441) who appears to have had it in his control up to the time of its delivery to the Appellant.

The item appears as a charge to the Standard Sanitary Manufacturing Co. under date of June 11th upon the cash book of the bankrupt, photostatic copy of which

is shown on page 625 of the Transcript of Record, and in the testimony of Mr. Nihel it appears that the Standard Sanitary Manufacturing Co. credited the check for $13,-000 upon July 11th 1929. So far as the record show, the money or the check was in the hands of the bankrupt, and payment to the Standard Sanitary Manufacturing Co. was made direct by the bankrupt.

The fact that the voucher recites that it was given in payment of certain jobs excludes the idea that it was paid upon an assignment. If it were paid on an assignment, the voucher would have such an explanation, and the custody of the instrument would have been in the Lincoln Mortgage Company from the time of its payment, which does not appear to have been the case, from the testimony in this record. It does not appear that they ever saw the alleged assignment, and the only testimony of any notification to them was the testimony of Dee Francis (Appellant's Brief page 12), which neither the Special Master nor the Court believed, and which they would not have been justified in believing, in view of the other false testimony of the witness that appears in the record, unless his testimony were corroborated by other evidence, which it was not.

While Appellant states in his brief, on page 5, that the Manager of the Standard Sanitary Manufacturing Co. accompanied Mr. Fryberger to the Bank, that statement in the brief finds no support in the transcript of record, and the contrary thereof appears in the testimony of Mr. Fryberger (T. R. 442). The exclusive custody of the instrument (the $14,000 check) was in the hands of Mr. Fryberger up to the time that he made the payment to the Appellant. The statement in Appellant's brief that there was acceptance of the alleged assignment

by the Lincoln Mortgage Company finds no support in the record, so far as we can discover; in fact it is directly contradicted by the voucher itself (T. R. 600, 601, 602). If it had been accepted it would have been in the possession of the Lincoln Mortgage Company, and this voucher would have been payable to the Standard Sanitary Manufacturing Co. and would have stated that it was in payment of the assigned account.

There was no credit upon the books of the Appellant of the assignment itself, and it does not purport to be given as security. It is charged on the books of the bankrupt as having been paid on June 11th, and appears (T. R. 625) as a credit on the books of the Appellant as paid to it on July 11th, 1929. (T. R. 594). That counsel for Appellant had been misinformed about this transaction appears clearly (T. R. 14) for in his answer he expressly alleges that the Lincoln Mortgage Company "delivered to this creditor the sum of $13,000", and the questions asked of Mr. Fryberger by counsel show that it was his belief that the moneys, to-wit, the $13,000, had been paid direct to the Appellant by the Lincoln Mortgage Company, and he doubtless never knew the contrary at all until he heard the testimony of Mr. Fryberger in answer to questions asked by him.

A draft, in order to be an assignment of an account, under the statutes of Arizona, must be accepted by the drawee.

Revised Code of Arizona, 1928, Section 2429.

Not only was this instrument not accepted by the Lincoln Mortgage Company, but no draft seems ever to have been made upon them by the Appellant or any other person, although the instrument itself purports to be only

an authority to make a draft on the Lincoln Mortgage Company. This is clear from the terms of the instrument:

> "Gentlemen: You are by this instrument authorized to draw on Lincoln Mortgage Company, of this city, in the amount of $14,196.77" (T. R. 236).

This is merely an authorization to the Appellant to make such a draft; that such a draft was never made may be inferred from the circumstances.

Although the Manager of the Appellant corporation, appeared on the stand, nowhere in his testimony does he state that this instrument was delivered to him, or to his company, or that it was ever in his possession, or that he ever received a payment thereon. (T. R. 586 to 599).

The authorization of this instrument is not to draw upon any particular fund of the Lincoln Mortgage Company, but to make a draft payable out of any general funds that may be in the hands of the drawee at the time the draft is presented; therefore it is not an assignment because it does not convey title to any particular fund, which is necessary to constitute an assignment.

This is not changed by the recitation that the same represents money due the bankrupt for work done and material furnished in construction of various houses and store buildings owned by the Lincoln Mortgage Company, clearly implying that the fund might have been derived from other buildings.

Nor is this changed by the following recitation: "This assignment effective this date", for if the instrument above mentioned does not constitute an assignment, a recitation to that effect could not make it so.

To assume that the bankrupts, men whom the record shows to have been of little education and not of wide business experience, would be able to determine the legal effect of an instrument, as to whether or not it was an assignment, when it is a question which has bothered the courts of every state in the Union to construe, and many of the United States courts as well, is to expect too much from people of limited education, especially those none too familiar with the English language.

The indisputable feature of this alleged assignment is the comparison of it with Respondents' Exhibits D and E appearing on pp. 237, 238 and 239 of the Transcript, where the language used is quite a common form of assignment. These two instruments, as well as the testimony of Mr. Nihel, are interesting from another standpoint, as disclosing the probable methods of the Appellant, and its purpose in taking assignments. It will be noted on page 238 of the transcript there appears a purported assignment dated December 5, 1928, the acceptance being dated June 23, 1929, more than six months after the purported assignment was given, and this acceptance was not made until it was known to the larger creditors that the bankrupts were insolvent (T. R. 282). Their evident purpose was to hold these instruments as a kind of club over their customers, but to conceal their existence from the general creditors so that the bankrupts could obtain money on general credit to pay their bills.

Another interesting fact revealed by Mr. Nihel (T. R. 592) was that (in answer to a question relating to a number of assignments dated May, 1929) he had never seen them before, had no knowledge that they were ever given, and knew no reason why they should have been

given; this, taken in connection with the fact of his failure to testify in regard to any delivery of the instrument dated March 5th to him, or any testimony as to having received any payment thereof, or any testimony as to how these matters were handled, strikingly reveals the fact that these instruments were designed, not as assignments as understood under the bankruptcy law and under the rules of equity, but as mere things to be presented in case of the failure of the alleged assignors, and thus to secure preference over other creditors. Such action renders an instrument so taken a nullity. (T. R. 592).

It will be noted in this connection that on May 14, 1929, Dee Francis, who signed this instrument, denied to Mr. McNichol (T. R. 571) that he had given any assignments whatsoever, and according to Mr. McNichol's testimony on several other occasions, in answer to questions by Mr. McNichol, he repeated that he had not and that the firm had not made any assignments whatsoever. This statement that he had made such assignments was made on May 14th when he was applying to the bank for a loan, and he actually received from the bank, on May 15th, a loan of $1,000. It would be taxing credulity to claim that the bank would have loaned him the money if he had told the truth about the so-called assignments, if such they were.

A comparison of these assignments with Exhibits D and E shows that Exhibit C (T. R. 236) has no witnesses to it, while assignments D and E (T. R. 237, 238, 239) are in each instance witnessed by Frank J. Campbell and I. L. Nihel. Apparently the instrument dated March 5th was prepared by someone other than the bankrupts or the Appellant. This is probably the explanation of why Mr.

Nihel gave no testimony in regard to this instrument, and in all probability counsel for Appellant had never been informed of the facts in regard thereto.

The testimony of Frank McNichol in regard to his conversation with Dee Francis on May 14th (T. R. 572) is very striking. He says: "I met Dee Francis as I was coming out of the bank. It was the day before they got the last loan from the bank, and he said he needed $1,000; I said he would have to take it up with Mr. Norris or some other officer of the bank; I asked him if he still had the money coming on the courthouse job and he said yes; I said was any of that assigned, and he said no. I said I would like him to cover them with some kind of security and asked him for an assignment; and when I got back to the bank I found a loan of $1,000 had been made him by another officer of the bank."

On page 571 of the Transcript, Mr. McNichol further testified: "I had requested that he bring in a list of moneys due them and this (referring to Petitioners' Exhibit No. 27) was brought to me in response to my request. After that statement was given to me, I had conversations with D. L. Francis as to whether any of these contracts had been assigned, and Mr. Francis said none of them had been assigned; he repeatedly made these statements to me. Every time he brought in a list I asked him, but he would always say no." (T. R. 571).

It will be noted in Exhibit 27, shown on page 596 of the Transcript that there was then due to the bankrupt partnership the sum of $15,435.92 on 41 cottages now finished.

Mr. McNichol also says that at no time subsequent to the date of that statement did he have any notice or

knowledge that that contract had been assigned. During the month of May, 1929, he had a conversation with D. L. Francis in regard to these assignments. (T. R. 571, 572).

Mr. McNichol is an unimpeached witness, a reputable, reliable and truthful witness; Mr. Francis is what this record shows him to be.

Secret assignments are void in Bankruptcy.

Benedict v. Ratner, 69 Law Ed. 991; 268 U. S. 353-365.

As appears earlier, the $14,000 item never passed through the bank account of the bankrupts. It appears that at that time they were making very few deposits,—the business was on its last legs, and this payment was made on June 9th and paid over to the Appellant on June 11th, and no deposits were made in the bank by the bankrupts between the dates of June 18th and August 17th,—this latter being the date on which the petition in bankruptcy was filed. (T. R. 554).

Leo Francis, who claimed to own the whole business, testified: "I do not know that the Lincoln Mortgage Company accepted the assignment; I don't know that there was a written acceptance. The Standard Sanitary Manufacturing Company gave us credit after they got the money in June. I wasn't present when the money was paid." (T. R. 355).

On June 22, according to the testimony of C. L. Lane (T. R. 282) there were conferences at the Commercial National Bank and Fryberger and Nihel participated in these conferences. The purpose was to ascertain the condition of the company. "Figures on accounts

payable to Standard Sanitary Manufacturing Co. account furnished from Mr. Nihel", but Nihel seemed to have been silent at these conferences in regard to any question of assignments. The conferences were to find out the true condition of the company; Nihel was urging the need for creditors helping the company over its difficulties; he did not say it was a going concern at all these conferences, although he may have said it at one time. Figures were compiled to figure out the exact condition of the firm, but no one was ready to step forward and help them. "I spent a lot of time over it; it was patent that the Phoenix Plumbing & Heating Co. was insolvent. The reason for preparing the statement was that I was directed by bank officials to find out the exact condition of the Phoenix Plumbing & Heating Co. I know they were insolvent definitely on July 20th, but had reason to believe it before. On figures furnished by Mr. Fryberger, insolvency was established. The figures on the statement show them insolvent. Nihel did not say the concern was solvent on July 20th; he said at that time we would be lucky if we got so many cents on the dollar." (T. R. 283).

Again we find that Mr. Nihel makes no reference to the so-called assignments. They were in a conference to obtain funds for the continuation of the business; it was his duty to speak if he expected the bank or other unsecured creditors to furnish the capital to complete the contracts then on hand and out of which he expected to realize the money for the merchandise sold by him.

D. L. Francis testified that he did not give notice to other creditors of the assignments of Lincoln Mortgage Company to the Standard Sanitary Manufacturing Company on March 5th. (T. R. 428).

Appellant does not appear to contend that the payment of the $13,000.00 did not deplete the estate, or that it did not receive a larger proportion of the assets than other creditors of the same class would receive. It could hardly do so in view of the schedules filed by the bankrupt, Leo Francis, from which it appears that the appellant has received more than twice as much money as all the other unsecured creditors together would have received, if the full amount of the scheduled assets should be converted into cash.

Appellant seems to contend that no intent is shown in the evidence. As to that we submit that intent can seldom be proven by direct evidence, and any direct evidence by the bankrupt of his intent would not be entitled to much consideration in Court, in view of the falsity of the bankrupt's testimony upon material matters in this case as shown by the evidence in the Transcript of Record referred to in our Statement of Facts and our Argument under that head in this brief, and from the payment of the money while the bankrupt was insolvent, the intent is necessarily implied. The rule is laid down in *Toof v. Martin,* 20 Law Ed. 481; 13 Wall 40, and this, with other cases cited in our Brief of Argument, are sufficient, we think, upon this point. No attempt was made to overcome the presumption arising from the evidence of the payment of this large sum of money by the bankrupts at a time when the record shows that they were insolvent.

That the payment was made within the four months' time is a mere matter of examination of the records. The money was paid either June 9th or 10th, 1929, and the creditors' petition was filed on August 17, 1929.

Falsity of Bankrupts' Testimony.

As the findings of the Master confirmed by the Judge are founded on conflicting testimony and as in the view of Appellees, Appellant's case depends entirely on the testimony of bankrupts we deem it important to place before this Court the character of the bankrupts and what the record discloses as to their truth and veracity.

It will be noted that the testimony in regard to the payment of the $14,000 by the bankrupts, through Mr. Fryberger, direct to the Phoenix Plumbing & Heating Company and the elements of the preference are proven by witnesses whose testimony is clear and unimpeached, and their character clearly appears as being that of persons interested only in telling the truth. We propose now to contrast that with the testimony on which Appellant's case against the petitioning creditors rests.

It will be noted that all of the elements necessary to prove a preference are thus established by testimony other than that of the bankrupts themselves, although the various admissions by the bankrupts, made reluctantly and many times wrested from them by a rigid examination, confirm the truth of the statement of disinterested witnesses.

We now propose to show that the Special Master and the Judge of the District Court could not do otherwise than reject the testimony of the bankrupts except in so far as it consisted of admissions against interest, or as to such matter as was corroborated by other testimony of reputable witnesses, or by documentary evidence.

The issue of partnership was one that was hotly contested by the bankrupts, and each of them in the hearing before the Special Master denied same; and, although their answer has not been made a part of this record, the evidence of the falseness of their testimony on that issue (it being a material issue), is such a contradiction of both documentary evidence and testimony of unimpeachable witnesses that it was considered false by the Special Master and by the District Judge, and could not have been otherwise, under the facts as here shown.

Leo Francis testified:

"D. L. Francis bought it for me before I came; I was the sole owner" (T. R. 336) this being in reference to the business known as the Phoenix Plumbing & Heating Company which is referred to on that page of the record.

In answer to question of his counsel, he stated "I am sole owner of Phoenix Plumbing & Heating Company." (T. R. 343).

"I never told him that the three brothers were partners." (T. R. 343).

"I had other liens; they were not on file as partnership liens; there were two or three of partnership." (T. R. 344).

"Gehres found that affidavit of partnership was necessary to support them, after the Bachowitz liens were filed." (T. R. 343, 344).

In testifying as to the $1100, Leo stated: "Father loaned it to me,—not all three boys. It did not show on books of the Phoenix Plumbing & Heating Company that I owed him $1100 when I started business. It was in

family so I didn't show it in accounts payable on statements we made." (T. R. 352).

"The insurance men knew there was no partnership. Nothing was said between me and school district representatives about partnership, or bonding company. It was so understood the first bond we signed. (T. R. 357). I never told the bank we were partners; I told them I owned the business." (T. R. 358).

"I knew I was signing articles of partnership, but didn't know I was running into all this stuff. * * * they waited until time to file lien was almost over; it was done to make the lien good. Had no thought of creditors; only desire to save $2,000 on lien for concern. Mr. Gehres told me to do that." (T. R. 359).

A few moments later he testifies: "Gehres did not get information as to partnership from me; he was working there a few months before that time * * *." T. R. 359).

That the above testimony of Leo Francis was false and that he knew it was false is clearly shown on page 73 of the transcript of record, Exhibit No. 1, which is a plumbing contract entered into on the 5th day of September, 1928, by and between Leo Francis, D. L. Francis, and Lyon Francis, a partnership doing business under the firm name of Phoenix Plumbing & Heating Company. The contract is signed by the Phoenix Plumbing & Heating Company and the signatures of each of the three brothers is attached thereto as members. This contract is shown on page 80 of the transcript. It was produced by Mrs. Louise Gage Dennett, Clerk of the Board of Education, and custodian of the contract. (T. R. 355).

That the above quoted testimony of Leo Francis is false is further shown by the bond accompanying said contract which is set up in the transcript of evidence at pages 80 to 84, inclusive, of the record, and which is signed by Phoenix Plumbing & Heating Company a partnership, and the three brothers as members, the signatures appearing on page 82 of the transcript of record.

The falseness of this testimony is further shown by petitioners' Exhibit No. 4 (T. R. 89) which was a statement to R. G. Dun & Company, showing that the three brothers were partners and so represented to be on August 18, 1928, and from this statement it also appears that a similar statement was made May 31, 1928, signed by the Phoenix Plumbing & Heating Company by Paul E. Gehres. (T. R. 90).

In a further statement to R. G. Dun & Company, petitioners' Exhibit 26 (T. R. 198) the full names and ages of the three brothers are given. This statement was signed on August 14, 1928, by Phoenix Plumbing & Heating Company by Paul E. Gehres, Cashier, in which it is stated that all items of the statement relate to June 1st, 1928.

The testimony of Leo Francis is also shown to be false by the testimony of Floyd M. Stahl, attorney at law, who testifies as follows:

"I was present at a conversation held in Mr. Norris' room at the Adams Hotel the latter part of July at which Leo Francis, Mr. Norris, Mr. Lane and Mr. Fretz were present, and Leo Francis said at that time that the Phoenix Plumbing & Heating Company was a partnership run by the three brothers on a profit-sharing basis. * * * to the best of my recollection, Leo denied that it was his

business alone; he said it was the business of all of them." (T. R. 430, 431).

Leo Francis' testimony is further contradicted by the testimony of Walter S. Wilson, Clerk of the Superior Court of Maricopa County, who produced the records in cause No. 28535, wherein, in a sworn complaint, the Phoenix Plumbing & Heating Company is designated as a copartnership consisting of Leo Francis, D. L. Francis and Lyon Francis (T. R. 266, 267). Such falseness is also shown by the certificate of copartnership, executed by all three of the brothers on the 27th day of December, 1928, acknowledged before a Notary Public and filed in the office of the County Recorder of Maricopa County, Arizona, on December 28, 1928, in Book 2 of Partnership Records, at page 144 thereof. (T. R. 251). And this was found as a fact in the findings of fact of the Special Master (T. R. 22). That neither the Special Master nor the Judge of the District Court believed the bankrupts upon the issue of partnership also appears clear from the findings numbered 9, 10 and 11, on page 22 of the Transcript of Record, wherein it is found that each of them owned an interest in the Phoenix Plumbing & Heating Company and participated in each of the acts of bankruptcy herein mentioned.

That the testimony of bankrupts Leo Francis and Dee Francis is unworthy of belief by the Special Master or the Judge also clearly appears from the following evidence in the record:

The testimony of Leo Francis is further shown to be false by the testimony of C. L. Lane, of the Commercial National Bank, in Phoenix, that in July, 1929, at a conference in the Adams Hotel at which were present

Leo Francis, Mr. Norris, President of the Bank, Mr. Stahl, and Mr. Fretz, Leo Francis stated that the business was a partnership and that he and his two brothers shared the profits. (T. R. 278).

The bankrupt, Dee Francis gave false testimony in regard to the partnership as follows:

"I bought the business for him (referring to Leo Francis) I put it 'D. L.' so it would be Leo's initials and cover both names as a joint name. Leo's name isn't "D. Leo.'" (T. R. 635).

Dee Francis opposed the adjudication upon the ground that he was not a partner, and in the hearing before the Special Master and before the Judge he was represented by O. E. Phlegar, as counsel.

Upon the issue of partnership Dee Francis was contradicted by the testimony of Mr. Frank McNichol, Cashier of the Commercial National Bank, who stated that he had had a conversation with Dee Francis about the middle of October, 1928; that he called him in there to get acquainted with the business, and the first thing he asked him was whether the business was a corporation, and Dee Francis said it was not; that it was a partnership composed of the three brothers; that he handled the financial work and the estimating and that the other two members were practical plumbers, and supervised construction.

This witness further testified:

"I distinctly remember when he first came in, in October, and established the fact that he and his two brothers were the Phoenix Plumbing & Heating Company, and that was later confirmed by Dun and Bradstreet reports." (T. R. 566, 567).

Witness further identified Exhibit No. 18 for identification and testified that it was the statement handed to him by Dee Francis for the purpose of trying to influence him to give them further loans; it was handed to him soon after February 15, 1929, and is Petitioners' Exhibit No. 27 in evidence. (T. R. 203).

The testimony of Dee Francis was further shown to be false by the various bonds which he signed, along with his brothers, showing partnership transactions, by the certificate of partnership heretofore referred to, in the complaint in the Bachowitz case, to which he made verification, and by other portions of his testimony not here referred to.

That Lyon Francis was a partner is also shown by his signature to the various bonds and other instruments referred to above.

Knowledge of Insolvency.

Knowledge of insolvency may be clearly imputed to each of the bankrupts at various stages of their partnership. From the statement of facts heretofore set up in this brief, it is clear that the business was started on a shoe-string, and that they never acquired any money through profits on any single contract. That this company could have continued for twenty-three months and they be deceived as to its condition is impossible. Their subsequent conduct showed that they acted with knowledge of insolvency, particularly their conduct between the dates of January 1, 1929, and the time of the incendiary fire on April 21, 1929. That the two brothers, Leo and Dee Francis, were drawing money out of the firm

at a rate that not even a solvent concern could stand, is clear from the testimony, and is only explainable upon the theory that it was done knowing that the institution was soon to be bankrupt. They drew, during this period of almost four months, very large amounts, for no reason given, and then the records covering this period, especially the cash book, was destroyed in an incendiary fire. Dee Francis was present about 9:00 or 9:30 the night the fire started, and he left Gehres there, according to his testimony. The fire was started with a slow fuse, and to burn down and then set fire to the building, according to the testimony of Mr. Green and Mr. Asche, police officers, this must have been arranged at about the hour Dee Francis admits he was on the premises. (T. R. 384). Strangely, too, the safe door had been left open and the cash book that contained the records of the payments during this critical period was the one book that was practically totally destroyed. That Leo Francis was cognizant of the situation appears from his testimony at various places. He paid the last of the $700 due his father two months prior to the date of the bankruptcy. (T. R. 353). He drew $400 for himself—not for business purposes but for some unexplained reason—about the 1st of January, 1929. (T. R. 357). He permitted his brother to check out large sums of money for unexplained purposes, and certainly not for business purposes, the sum of $2100 being paid during March and April alone to one Thomas,—why it does not appear. (T. R. 388). Dee paid $1100 to Carom (T. R. 387) and no record can be found to justify that payment. At that time he appears to have bought $1400 in stock of the Arizona Garment Company for himself, and the money was paid out of the funds of the bankrupts. (T. R. 388).

Dee Francis admits he knew how much they owed creditors, the larger ones, not the smaller ones. (T. R. 396). He drew $3250 a year and expenses; he did not know what was coming to him on January 1, 1929, whether $100, $500 or $1,000. (T. R. 396).

When it is considered that at this time they were endeavoring to get additional moneys for their payrolls from the Commercial National Bank, without any security; that they were not paying anything to the general creditors; that further credit had been refused to them during this period by various concerns, there is only one explanation to be made as to the withdrawals of these large sums of money and the convenient fire that followed, and that was to drain the business of every cent they could get their hands on, and of all money they could borrow from the bank. That an explosion occurred and put out the fire and prevented the total destruction of their records, was something they had not counted on.

Testimony on Which Appellant Relies to Establish Alleged Assignment on March 5th, 1929.

The testimony of Leo Francis upon which Appellant relies to establish its defense is set up in Appellant's brief at page 12, and is given by question and answer.

Leo Francis is asked if it was not a fact that he gave the Standard Sanitary Mfg. Company an order on the Lincoln Mortgage Co. for all the money due March 5th, and he answered "Dee gave them". Q. Did you know about it? A. Yes, I had heard them talk of it. Q. It was agreeable to you that that should be given? A. Yes. Q. It was on March 5th? A. I could not say; it was in 1928."

From the above it is evident that the witness knew nothing of the transaction; that he had never seen the instrument and had only heard something about it, from whom does not appear. He was shown Exhibit "C" for identification and asked if he ever saw that before, and he answered by saying "I wouldn't say that I have seen it, but I talked with Mr. Bower about it. I knew he had it."

We have heretofore shown that this evidence was not believed by the Special Master or by the United States District Judge, and in view of what is disclosed as to his lack of truth and veracity, by the evidence heretofore set out, how could they have believed him?

Mr. Bower was not called to the stand, nor is it shown that he was not available. The witness Leo Francis was plainly led along by counsel for Appellant, to whose cause he was very friendly and whom he doubtless liked personally, and was asked the question: "The Lincoln Mortgage Company accepted it?" and the answer was "Yes". Afterwards in his testimony it was disclosed that he did not know whether they accepted it or not. (T. R. 355).

His testimony, however, is interesting on another point, and on this point he is corroborated by testimony that is unquestionably true. In answer to question by counsel for Appellant he said "They gave us credit when they collected that $13,000."

He testified to many legal conclusions, showing that he was a "yes man". In about two pages of testimony quoted by counsel for Appellant in their brief (pages 12 to 14 incl.) there are twelve "yes" answers. We assume that the testimony of a witness so gently led along, and

the character of the witness as shown by other testimony in this transcript, are not sufficient to overthrow the findings of fact made by the Special Master and by the Judge of the District Court.

The bankrupt, Dee Francis, is also a good "yes man." Questions are asked of this witness, as shown in brief of Appellant, at page 14, and each of these questions is answered "Yes." We submit, too, that the testimony of this particular witness, which has been contradicted by documentary evidence and by the testimony of reputable witnesses upon other material issues in this case that were important issues in the trial below, is not worthy of belief and should not have been considered by the Master or the Judge, as it evidently was not, as shown by the finding of fact upon that question.

We call the court's attention to the fact that the testimony contained in these four questions and answers of "yes" are the only testimony in the record to indicate that the instrument dated March 5, 1929, ever passed into the possession of the Standard Sanitary Mfg. Company, and is the only testimony as to its being delivered, if ever delivered.

It will be noticed from the testimony of Mr. Nihel (T. R. 586 to 599) that this particular document was not produced by him, as were the other so-called assignments in his possession, nor was it produced by the Lincoln Mortgage Company in whose possession it would have been if it had been a valid assignment. Nor was any draft produced or testified to as having been drawn in accordance with the instructions in the instrument itself. Apparently it never was in the possession of the Standard Sanitary Mfg. Company or the manager thereof would not have allowed it to be introduced at the hearing,

on the testimony of a discredited bankrupt witness. We give Mr. Nihel credit for not being willing to perjure himself in order to establish his contention in this matter. He was the one person who could testify as to these facts and he would not otherwise have left the establishment of so vital a proposition as this to the unreliable and very doubtful testimony of one of the bankrupts in whom he had no confidence and whom he believed was a rogue and a thief, if we are to believe the testimony of Leo Francis given on page 337 of the transcript of record in which he says that Nihel advised him to get rid of Dee and of Gehres because their payrolls were too large, and other discrepancies referred to.

We submit that the testimony of this witness is utterly worthless, and that this court would have reversed any finding based upon it.

The only reputable witness upon whose testimony they relied is that of Mr. Fryberger, and evidently counsel had been misled as to the truth of the facts or he would never have asked the questions he did of Mr. Fryberger that he did ask. Counsel asked this question, on page 11 of his brief:

Q. "Isn't it a fact that the way that was handled was that a check was made to the Phoenix Plumbing & Heating Company for $14,000?"

A. Yes, sir.

Q. The check was endorsed over by the Plumbing Company to the Standard Sanitary Mfg. Company?

A. No, sir. I went to the Citizens Bank and had two Cashier's checks made, one for $13,000 and one for $1,000.

Q. Taken to the bank by yourself?

A. Yes.

Q. And you took in place thereof a check for $13,000 to the Standard Sanitary Mfg. Company and a check for $1,000 to the Phoenix Plumbing & Heating Company?

A. Yes."

It will be seen from the above that counsel had assumed that the original check had been received by the Phoenix Plumbing & Heating Company and endorsed directly over to the Appellant, and evidently the first time he learned the contrary was when he heard the answer of Mr. Fryberger. The only testimony that he gives that would tend to show that these contracts (not book accounts) were ever assigned to the Standard Sanitary Mfg. Company was the question and answer on page 12 of their brief:

> Q. "And the Lincoln Mortgage account was assigned to the Standard Sanitary in March?
>
> A. So I understand."

We submit that this is not competent evidence and has no probative value. It is an answer we give when we do not know the facts but have heard statements in regard thereto. There is no evidence that Mr. Fryberger ever saw the instrument in question; he was not an employe of the company at that time, nor for three months afterward.

Assignments.

Mr. C. L. Lane of the Commercial National Bank, testifies:

"After that statement was given to me, I had conversations with Dee Francis as to whether any of these contracts had been assigned, and Mr. Francis said that no contracts had been assigned; he repeatedly made that statement to me. Every time he brought a list in I would ask him if there had been any assigned but he would always say no." (T. R. 571).

Dee Francis testified:

"I had no conversations with representatives of the bank regarding assignments of any jobs we were working on; they did not ask me to assign any contract. I told Mr. McNichol that there were no assignments on the city hall job; I said we had money coming in, but I don't think I specified the City Hall job." (T. R. 409).

"I did not give notice to other creditors of the assignment of the Lincoln Mortgage Company to the Standard Sanitary Mfg. Company on March 5th."

(Testimony of Dee Francis, T. R. 428).

Counsel for appellant states in his brief at page 32, that there is no clear indication of insolvency up to the very day of adjudication, and then attempts to explain away the findings of the certified public accountant, Mr. Jerry Lee, and the financial statement prepared by him as of August 17th, showing excess of liabilities over assets of over $43,716.06 (T. R. 196) and the financial statement of April 30, 1929 (T. R. 197) prepared by the same accountant showing a deficit on the latter date of $30,165.82.

Counsel for appellant dismisses the financial statement prepared by the creditors as of July 20, 1929 (T. R. 223) with the statement that it shows "some indica-

tion of insolvency as of that date". The indication referred to is that it shows an excess of liabilities over assets of $20,436.25 (T. R. 223). He ignores entirely the statement of June 22nd as corrected by the testimony of Mr. Fretz, the bookkeeper who prepared same, who called attention to the fact that in making this statement he had failed to include therein the probable cost of materials and labor necessary to finish the work on the outstanding contracts. The contracts he had listed as having a value of $47,400.64. There were figures to indicate that at least $18,945.00 would be required to complete the work. This would leave them insolvent as of that date in the sum of $13,226.21. As a matter of fact the liabilities were much greater and the $47,400.64 was a mythical asset as was demonstrated later when $25,-065.07 of that amount was taken over by the various bonding companies for the completion of the work. (See T. R. 25, under title "Unliquidated Claims"). And up to the time of the hearing, the receiver in bankruptcy of this estate had not been able to collect anything upon any of these contracts, and it is fair to assume that they all proved liabilities.

Much of the matter set up on pages 33 and 34 in appellant's brief does not find any support in the record. There are no references to the parts of the transcript of record where the alleged evidence can be found. Therefore it is difficult to point out the inaccuracies. This much is true. The financial statement of April 30, 1929, was prepared by the Southwest Audit Company, and Mr. Lee of that company was retained by the petitioning creditors not to make a complete audit of the Phoenix Plumbing & Heating Company's book after the petition in voluntary bankruptcy had been filed, as is the inference that

might be drawn from the language used in appellant's brief on page 33, but to prepare a true statement of the assets and liabilities of the bankrupts as of the dates of April 30, 1929, and August 17, 1929. The result of his work is set up on pages 196 and 197 of the Transcript of Record. The purpose of Mr. Lee's being retained by the bonding companies to audit the books of the Phoenix Plumbing & Heating Company does not appear in the record to be as set out in appellant's brief, but his employment at that time was to ascertain the condition of the particular jobs in which the bonding companies were interested, as well as what could be ascertained by the records accessible to him and outside information that might be obtained. This was a very different proposition from that of preparing a statement of the assets and liabilities of the bankrupt as the same appeared upon the records of the bankrupt copartnership. We do not recall that there is anything in the record about his securing the figures upon which the bonding companies were able to make satisfactory settlements with the materialmen involved. We think the inference is to the contrary for it would appear that no settlements had been completed at the time of the filing of the schedules in bankruptcy by Leo Francis (T. R. 125, 126, 127) and nowhere in the testimony are we able to find that such settlements were made. If they had been, we presume that the receiver in bankruptcy would have done his duty and have collected such sums as might have been due the bankrupt therefrom.

So it is apparent that Mr. Lee was correct in declining to list as assets the $25,065.07 shown in bankrupt's schedules not to be assets, although listed as unliquidated claims. It was also proper for him to refuse to list the

$3,700.00 Bachowitz claim as that was a total loss (T. R. 344, 151, 159), long prior to that time. So it is demonstrated by these various statements that the appellant in his brief is mistaken when he asserts that "there is no clear indication of insolvency up to the very date of the adjudication."

We submit that the testimony of the expert accountant, together with the figures compiled, show during this period from April 30th to August 17th that the liabilities of the bankrupt exceeded the assets of the bankrupt by a sum in excess of $30,000.00. In our Statement of Facts (See pages 6-21 of this brief) we have compiled the figures that show that this bankrupt started business with a capital of either $800.00 or $1,000.00; that within ten days of the Remsbottom purchase, this was all dissipated in preliminary expenses and the purchase of the so-called good will, which appears to have been of no value whatsoever unless it enabled the bankrupts to obtain a credit they would not otherwise have received. The testimony also shows that so far as their records disclose, they never made a profit on a single contract that was entered into. There is a striking bit of testimony given in this regard by Leo Francis when he says that after Mr. Fryberger became the manager they did not get any more large contracts; that he bid upon them and his bids were too high. This, we think, explains what happened in this case. Mr. Fryberger was an experienced man and his bids must have been such as would have allowed a reasonable profit. The bankrupts,—at least two of them—were very young and inexperienced, and the other had a record of a failure in business and insolvency that terminated in an assignment of his property and book accounts to the Crane Company just two months before the starting of the

Phoenix Plumbing & Heating Company. It was an inauspicious beginning and any business man with knowledge of the facts could easily have foretold the bankruptcy which was only postponed through the taking of contracts at figures that while they must have eventually landed the firm in bankruptcy, gave the appearance of success and furnished a basis for obtaining credit which was bolstered up by financial statements that were undoubtedly false.

Appellant in its argument, page 17 of its brief, contends that the instrument, "Exhibit C" (T. R. 236) is not only an assignment, but an order to the Lincoln Mortgage Company for the sum of $14,196.77. In this it is mistaken. The instrument is addressed to the Standard Manufacturing Company, and the language of it is:

> "You are by this instrument authorized to draw on Lincoln Mortgage Company, of this city, in amount of $14,196.77."

There is no testimony in the record that such a draft was ever made, much less accepted, and according to the laws of Arizona, Revised Code of Arizona, 1928, Sections 2429 and 2433 such an instrument does not constitute an assignment unless accepted in writing by the drawee. And although appellant's brief, page 18, claims that the Phoenix Plumbing & Heating Company had no jurisdiction whatsoever over this money and had no right to draw on the same or demand any portion thereof from the Lincoln Mortgage Company, the record contradicts this assertion. In the first place the Lincoln Mortgage Company never paid the amount of $14,196.77, nor was this amount ever credited by the appellant on the account of the bankrupts. (T. R. 442). Then the Lincoln Mortgage Company exercised its control over the fund in

question by drawing its voucher check payable to the Phoenix Plumbing & Heating Company and delivering the same to Mr. Fryberger, the manager thereof (T. R. 442) deducting therefrom $196.77 (T. R. 602). The bankrupt then through Mr. Fryberger exercised dominion over the fund in question through Mr. Fryberger by taking the check into its possession, cashing the same, purchasing a draft for $1,000, (T. R. 442). Bankrupts further exercised dominion over the fund in question by allowing to the Lincoln Mortgage Company a discount upon the account of $196.77 (T. R. 602). It further exercised dominion over the sum in question by having a check drawn to the appellant for $13,000.00 and charging same upon its cash book to the appellant, forwarding the check to the appellant and the same was acknowledged by credit upon the books of the appellant to bankrupt for the sum of $13,000.00, no previous credit having been given for the fund alleged to have been assigned; and it will be borne in mind that the instrument itself does not represent that it was given as security for the payment of any debt, nor does the instrument itself in terms preclude the bankrupt from making a draft for any amounts upon the Lincoln Mortgage Company.

Further on in this argument we will show that under the authorities the writing does not constitute an assignment of the fund.

On page 18 of appellant's brief, counsel makes this statement:

> "The Court will know that the testimony of Leo Francis who claimed to be the proprietor of the business, and who, according to all the evidence was clearly one of the partners, was to the effect that the

Lincoln Mortgage Company accepted this assignment on the 5th day of March (Statement of Evidence, page 335). This evidence of acceptance on the part of the Lincoln Mortgage Company was not repudiated by evidence produced by the petitioning creditors."

What appellant fails to state in its brief, is that Leo Francis himself repudiated his evidence. (See T. R. 355).

On the same page of its brief, page 18, appellant contends that the assignment was for a definite, liquidated amount in the hands of the Lincoln Mortgage Company and a specific fund, and that the full title and right was transferred by the bankrupt to the appellant on the 5th day of March.

Far from being a specific fund the instrument is drawn upon the Lincoln Mortgage Company generally and does not set out to be drawn upon any particular fund in their hands, nor is there anything in the evidence to indicate that they held any specific fund to which the same might have been directed. We are not contending that there may not be an assignment of book accounts if properly made; nor that there might not be a specific assignment of a contract or contracts, and in case the claim is that it is an assignment of a contract, to make a valid assignment, the contract itself should be delivered to the assignee in order to make it valid and possibly this assignment should be in writing in order to convey the title.

On pages 18 and 19 of its brief, appellant asks that, what he calls the fundamental test of the bankruptcy law, be applied to the transactions and asks could the bankrupt exercise any right, control or claim upon the $14,-

000.00 "assigned" in Respondent's Exhibit C, or could any representative successor or assignee of the bankrupt make any claim or exercise any right over the said fund after the "execution" of said "assignment."

The answer to that is that the bankrupt did exercise control over this fund and that at no time did the appellant ever exercise any control over this fund, as shown by the record above cited, and up to this date the appellant has never obtained control over the fund in question and received only $13,000.00 of the amount which it now claims its own and the testimony excludes any idea that the money was paid to Mr. Fryberger as an agent of the appellant.

We must again call the attention of the Court to the error into which counsel for the appellant has been drawn and of his failure to carefully examine the Transcript of Record, for he speaks of the check being "delivered to these two men, who thereupon went to the bank upon which the check was drawn and deposited the same, and by mutual agreement two cashier's checks were drawn." There is nothing in the record to even hint at the transaction being in such form. It is directly contradicted by Mr. Fryberger, the man who handled the checks, the man who procured the check voucher from the Lincoln Mortgage Company, and his testimony positively states that the facts as asserted in appellant's brief did not occur. (T. R. 442).

On the same page of its brief, page 19, appellant says: "As it appears in the testimony, the Standard Manufacturing Company permitted this disposition of the money so as to save the Phoenix Plumbing & Heating Company its payroll." This too finds no support in the record. As shown above Mr. Fryberger for the bank-

rupt cashed the checks and so far as this record shows, applied the money as he saw fit.

We agree with the law as quoted by appellant on page 20 of its brief and as laid down by the Supreme Court of the United States in the case therein cited, but the trouble is that the facts of the present case do not bring the instrument in question within the rule there laid down. In the first place the Master's finding of fact excludes the idea that the instrument was ever delivered to the appellant or that appellant ever exercised any control over the fund in question. The Court will recall that the only testimony as to the execution and delivery of the instrument was the testimony of D. L. Francis in the four "yes" answers to the leading questions quoted by appellant on page 14 of its brief; and that the testimony of this witness was unworthy of belief, is shown in many places in the record, and that appellant's counsel did not consider him worthy of belief, may well be inferred from the question he uses in his brief on page 18, where he says, that according to all the evidence Leo Francis was one of the partners. This witness, Dee Francis, had testified strongly that there was no partnership and that Leo was the sole owner. That counsel for appellant was right in his statement in his brief that the evidence clearly showed that there was a partnership, is clearly demonstrated in this record, and that Dee Francis testified falsely in that matter is demonstrated in the record.

Counsel for appellant further claims in his brief on page 20, that the instrument was an order upon and an assignment of all the money in a specified fund of a definite party, which said order was accepted by the party holding the fund. We again call to the Court's attention that it is a statement in the brief not supported by the record.

The instrument itself does not purport to be an order upon any person or any fund. It is an authority to make a draft, and the instrument would not constitute an assignment until accepted by the drawee, this being the law of Arizona (Revised Code of Arizona, 1928, Sections 2429 and 2433) and the only testimony as to the acceptance of the instrument is the testimony of this same Dee Francis whom counsel for appellant has inferentially said was unworthy of belief.

Counsel for appellant briefly refers on page 22 of his brief, to the question of insolvency and states that he will discuss it more fully under the third assignment of error, however, stating at the same time that there was no real evidence of insolvency at any time prior to the 20th day of July. We will too leave the discussion of that question to the argument upon that branch of the case, merely stating here that counsel has ignored all the testimony of insolvency contained in the record in regard thereto, and has apparently forgotten that upon the failure of the bankrupts to appear with books and records showing their assets and liabilities, the burden of proof fell upon them to establish insolvency and that though some creditors were fooled by false financial statements designed for the purpose of obtaining credit, that is no evidence of solvency of the bankrupt who signed and published the false statements.

On page 22, counsel for appellant anticipated the "assignment" was a secret one and in "defraud" of creditors and calls the court's attention to the fact that the allegation of petitioning creditors in the proceedings is not that the transfer was made with intent to hinder and defraud or delay creditors. It is true that the allegation is merely that of a preferential transfer, but the rule of law

forbidding secret "assignments" is equally applicable to preferential transfers.

Nor is the allegation against the bankrupt that he committed an act of bankrutcy by the assignment of this $13,000.00 item to the appellant, but is that the payment of the money to appellant was under the circumstances a preferential transfer (T. R. 8). The alleged assignment is set up by the intervening creditor, appellant, is in the nature of a confession and avoidance, and the burden of proof is upon him to establish that the assignment was complete and for a present consideration; that he took notorious and exclusive possession of the fund and that the payment was actually made upon the assignment. All this is matter of defense against the allegation of the creditor's petition.

Answering appellant's contention that there is no evidence of intent to prefer this creditor over other creditors, it is sufficient answer to that, that intent is a matter of deduction from the acts of a party and not susceptible ordinarily of direct proof, and every person is presumed to intend the natural consequences of his acts.

On page 23 counsel for appellant contends that the Phoenix Plumbing & Heating Company had "potential assets" in excess of the amount of its liabilities. The trouble is that these potential assets consisted of hopes and expectations which developed into liabilities long prior to the filing of the petition in bankruptcy. Indeed, the differences between counsel for appellant and the certified public accountant who prepared the statement showing the insolvency of the bankrupts at the various periods prior to the filing of the petition in bankruptcy, seems to grow out of the fact that the accountant refused to recog-

nize these "potential assets" as being anything but liabilities. That they were liabilities is demonstrated by the testimony showing that they had to be taken over by the bonding companies responsible for their completion, and, of course, all expenses in connection therewith had to be deducted from these "potential assets". If these assets were not liabilities, there would be no reason for the requiring of a bond of the contractor.

Counsel says on page 23: "All of these jobs were bonded and these were ample security at that time for all of its debts". If this were true there would be no petitioning creditors to bring a proceeding in bankruptcy. Counsel has evidently mistaken the purpose and effect of the bonds given.

We approve heartily of the rule laid down in Gage Lumber Company v. McEldowney, 207 Fed. 255, quoted on page 24 of appellant's brief. The trouble though is that the facts are entirely different in that case, as may be seen from part of the opinion quoted by appellant. That was an assignment given for the purpose of securing money to purchase lumber or timber before the same was sawed, the lumber having been purchased by assignee to be delivered to him when sawed and was intended to apply on his contract. The difference in the two cases is that the alleged assignment in the case at bar was for a pre-existing debt and at the time that the alleged assignment was given, the work upon the Lincoln Mortgage Company property was completed, according to the statement furnished the bank, which statement is set up on pages 203, 204 and 205 of the Transcript of Record, and contains this description:

> "Lincoln Mortgage Company. Balance due on 41 cottages now finished $15,435.92."

(T. R. 204). So that the alleged assignment never induced the appellant to furnish any material for the construction of these buildings and none was delivered upon the faith thereof. As to the credit extended by the appellant to the Phoenix Plumbing & Heating Company thereafter, it may well be assumed that that credit was extended upon the faith that they had placed in the bonding companies, rather than any confidence in the bankrupts. This appears from the many alleged assignments they took, even of these bonded jobs.

Nor do we see that the quotation from Chief Justice White's opinion given on page 25 of appellant's brief, helps the case of the opinion. That opinion merely holds that where a check was given with "the understanding and agreement of the parties that an advance *about to be made* (Italics ours) should be a charge on and be satisfied out of a specified fund, a court of equity will lend its aid to *carry such agreement into effect as against the drawer of the check,* mere volunteers, *and parties charged with notice.*" (Italics ours.)

The difference between the two cases will be noted. In the case referred to in Mr. Justice White's opinion, there was an advance about to be made,—It became a charge upon a specified fund. Here there was no advance made,—the alleged assignment being to secure, upon the theory of the appellant, an advance, already made, the work already having been done, nor was the authority contained in Exhibit C to make a draft a setting apart in any form of any specified fund. It was a mere power given to make a draft. So far as the record shows, this power was never exercised.

Appellant states in its brief on page 26 that the Standard Sanitary Manufacturing Company had express

notice, the Lincoln Mortgage Company accepted the assignment, and the Phoenix Plumbing & Heating Company made it. There is no testimony that the Standard Sanitary Manufacturing Company had express notice, other than the "yes" answers of Dee Francis which the Master and the District Judge refused to believe. That the Lincoln Mortgage Company accepted the assignment does not appear anywhere in the record, nor does the appellant point out where it can be found. On the contrary all the facts and circumstances indicate that the Lincoln Mortgage Company did not accept the assignment, or anything else in connection with the transaction. This is shown by the fact that the voucher check of the Lincoln Mortgage Company was made direct to the Phoenix Plumbing & Heating Company and was not for the amount of the alleged assignment. (T. R. 600). It recites that it was in payment of certain "jobs" and the payment was made to Mr. Fryberger, the manager of the Phoenix Plumbing & Heating Company. (T. R. 601, 602). No clearer evidence, we submit, could be produced to negative the assertion in appellant's brief.

On page 25 of appellant's brief, the Court's attention is called to the fact that there is no provision in the State laws of Arizona by which assignments of the nature of the instrument introduced in evidence in this case are required to be recorded. That is true. But the statutes of Arizona, Revised Code of 1928, Sections 2429 and 2433 do require that an instrument such as is authorized to be drawn by the Standard Sanitary Manufacturing Company in Exhibit C (if same was ever executed) is required to be accepted in writing before the same becomes an assignment of the fund.

Counsel for appellant is in error when he states in his brief, page 30, that Mr. Lee of the Southwest Audit Company was retained by the petitioning creditors to make an audit of the Phoenix Plumbing & Heating Company's books after the petition in involuntary bankruptcy was filed.

Mr. Lee was employed to compile a statement for petitioning creditors of what the records of the bankrupt showed as to the financial condition of the bankrupts on April 30, 1929, and August 17, 1929. The two financial statements appear in the Transcript of Record at pages 196 to 198 inclusive. The work for the petitioning creditors was done about December, 1929 (T. R. 532). There is a statement by the appellant on page 33 of its brief as to the purpose for which Mr. Lee was retained by the bonding companies, and in it counsel says the purpose was to audit the books of the Phoenix Plumbing & Heating Company. Our understanding of the matter is that Mr. Lee was retained only to ascertain the status of the particular jobs upon which the Phoenix Plumbing & Heating Company had been working, and on which these bonding companies were liable, and that he was authorized by the bonding companies to make an investigation outside of the records of the Phoenix Plumbing & Heating Company and such information obtained outside, would, of course, only be hearsay, so far as this court was concerned and could not affect the accuracy of any statement drawn from the records of the bankrupts. This seems to invoke the ire of appellant's counsel, and he charges bad faith against the accountant because he does not put this hearsay in his testimony. The striking thing, however, about it is that the figures given by the accountant are verified by the schedules filed by the

bankrupt, Leo Francis for himself and the Phoenix Plumbing & Heating Company.

On page 35 of its brief, appellant refers to the incendiary fire that took place on April 21, 1929, and which so conveniently disposed of the cash book containing the record of the payments from December, 1928, until April 21, 1929, and criticizes the attorney for petitioning creditors for drawing out evidence indicating that one of the bankrupt partners was present at about the time that the fire was started. This evidence was given by Dee Francis (T. R. 384) and is an admission against interest by him. The evidence of Mr. Green and Mr. Asche shows conclusively that the fire was of incendiary origin (T. R. 284 to 288, incl.). Other evidence in the record discloses the motive and opportunity for the commission of the offense. The court will draw its own conclusions from the evidence in the record.

On page 34 of the brief, appellant says that with this matter, Mr. Lee was able to obtain a very accurate and clear statement of the amount due on the various jobs. The amount of money paid the Phoenix Plumbing & Heating Company and upon his figures, the bonding companies were able to make satisfactory settlement with the materialmen involved. We have been unable to find in the Transcript of Record the basis for this allegation. Mr. Lee testified that he was not present when the settlement with the materialmen was made. From the testimony of Mr. Thalheimer, the Receiver (T. R. 250) and from the schedules filed by Leo Francis (T. R. 99), it would appear that no settlements had ever been made between the bonding companies and the bankrupts or the receiver in bankruptcy up to the time of the hearing before the Master. Consequently this record does not show

whether the bonding companies were able to complete these jobs without loss to themselves or not, or whether they had claims against the bankrupt for a deficiency.

The statement on page 34 of appellant's brief that Mr. Lee "proceeded to make up statements for the petitioning creditors which would show insolvency," is utterly unwarranted. Mr. Lee is not responsible for the condition of the bankrupts and it was the condition of the bankrupts that required that the statements prepared by him did show insolvency. Appellant seems to be laboring under the delusion that uncompleted contracts on which in the very nature of things, there would have to be a loss, should be counted as assets, the theory apparently being that because it was not known by everybody on April 30, 1929, that bankrupts were insolvent, that an auditor making up a statement from the records several months later, should list as assets these contracts which time had demonstrated to be liabilities. In this connection we again refer to Leo Francis' schedules as showing that no course was left to the auditor other than the one that he pursued.

It is a strange assumption on the part of counsel for appellant that when the bankrupts are demonstrated to be insolvent upon August 17, 1929, and upon July 20th, 1929, that a presumption arises that a loss of assets amounting to approximately $62,720.05 had arisen between these two dates. This in the face of all the testimony to the effect that there had been no substantial change of conditions in the affairs of the bankrupts during these periods of time, and especially in view of the fact that the evidence taken as a whole shows that they were insolvent from October 10, 1927, and had never so far as their record shows, had one profitable contract in all that period.

On pages 35 to 38, inclusive, counsel for appellant attempts to analyze the statement of April 30, 1929, presumably with the purpose of showing that the bankrupts were solvent at that time. There is much in this statement of criticism of Mr. Lee, but nowhere in all these pages is a reference made to the Transcript of Record of supporting facts, or any reference whatsoever other than a mere one to Petitioner's Exhibit No. 25.

On page 39 of its brief, appellant's counsel refers to the testimony of Leo Francis, "that he believed that if he could liquidate and turn into cash his contracts receivable at any time prior to adjudication of bankruptcy, there would have been more assets than liabilities in the Phoenix Plumbing & Heating Company." This belief, had it existed, upon the part of the bankrupt, would not have been evidence of any fact. His unreliability as a witness has been disclosed in this record. His ability to turn into cash contracts erroneously called "contracts receivable" depended upon his business qualifications, his ability to estimate correctly the cost of carrying out the contract, including a proper proportion of the overhead of the business, and the ability to get business. This ability to get business, Leo Francis claims to have had, and his method is indicated in his own testimony in which he says that there were no large contracts after Mr. Fryberger took charge; that Mr. Fryberger put in bids but they were too high. Possibly Mr. Fryberger considered the advisability of making a profit upon the contracts and thus preventing his employers from being placed in bankruptcy.

On pages 40 and 41, appellant makes the statement that a proper statement of the assets and liabilities of the bankrupts on that date, would have shown that they

were solvent on April 30, 1929. If such were the case, why was not evidence introduced to that effect, and why does not appellant explain the loss in assets between that date and August 17, 1929?

The most surprising statement in appellant's brief is that "proof that a man was insolvent on a certain date, is not proof that he was insolvent on a date prior thereto." Appellant ignores the presumptions and inferences that are to be drawn from insolvency proven as of a given time and a failure to explain the disappearance of assets, if the assertion is made that the bankrupt was solvent at a previous time.

Citations on Assignments.

We believe the following citations on the law of assignments will be of assistance to the Court:

See Little v. Holybrooks Company, 13 A. B. R. 422 (5th Circuit 1904). The language of the Court on page 425 is as follows:

> "As to the second act of bankruptcy, that is the preferential transfer of property to a creditor just quoted below, this section fixes the date from which the four months will begin to run in cases involving written transfers required or permitted to be recorded, and when there is no provision for such record, the date of the beginning of the running of the four months is fixed at the time when the beneficiary of the transfer takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of the transfer * * *."

> "If the registry laws of the state are not applicable to the transfer, the four months limitation will

> begin only on implied notice to the creditors arising from change of possession or actual notice to them of the transfers."

and on page 429 the Court says:

> "The rule is harsher against the bankrupt than against the creditor. When the bankrupt wishes to avail himself of the four months limitation and the alleged act of bankruptcy is a transfer, four months must have elapsed from the record of the transfer if a record is required or permitted; if not, four months from the notorious possession of the beneficiary."

The case of Johnson v. Huff, Andrews & Moyler Co., 133 Fed. 704 (4th Circuit, Nov. 15, 1904), is a case which bears a strong resemblance to the one now on appeal. The assignment in this case reads as follows:

> "Roanoke, Va. January 30th, 1902.
>
> "Treasurer or Paymaster N. & W. Ry. Co., Roanoke, Va.—
>
> Dear Sir: You will please pay to Huff, Andrews & Moyler Co., for value received, any and all moneys that may now be due me, or may hereafter become due me as boarding boss on your line of road.
>
> "(Signed) John A. White.
>
> "Witness: Susie Chafin".

We quote from the statement of facts made by the Court showing the manner in which this was handled, from which it appears that this order was held until immediately prior to bankruptcy when it was presented to the person to whom it was addressed. The court held that the instrument was invalid and was effective as a

transfer only when presented to the railroad, and therefor constituted a preference within Section 60 of the Bankruptcy Act. The case is well considered and is supported by the case of Wilson v. Nelson, 183 U. S., 191-198, 46 Law Ed. 147, which is quoted from, and this case in its turn quotes the case of Mathews v. Hardt, 80 N. Y. Suppl. 462; In re Klingaman (D. C.) 101 Fed. 691.

The Court uses this language:

> "The creditor has jeopardized and forfeited all rights under such order and the fund ordered to be paid over to Huff, Andrews & Moyler Company by the Referee and District Judge, became vested in the Trustee for the benefit of the general creditors."

See page 707 of the opinion.

In Dillon v. Barnard, 22 Law Ed. 673, the Court says on page 677:

> "The present case, notwithstanding the largeness of the plaintiff's demand, is not different in its essential features from those cases of daily occurrence, where the expectation of a contractor, that funds of his employer derived from specific sources will be devoted to the payment of his service or materials, is disappointed. Such expectation, however reasonable, founded even upon the express promise of the employer that the funds shall be thus devoted, of itself avails nothing in favor of the contractor. Before there can arise any lien on the funds of the employer, there must be, in addition to such express promise, upon which the contractor relies, some act of appropriation on the part of the employer depriving himself of the control of the funds, and conferring upon the contractor the right to have

them applied to his payment when the services are rendered or the materials are furnished. There must be a relinquishment, by the employer, of the right of dominion over the funds, so that without his aid or consent the contractor can enforce their application to his payment when his contract is completed."

In Houchin Sales Co. v. Angert, 11 Fed. (2nd) 115, the court says at page 117:

> "There are questions of fact involved in the findings of the special master, as well as some conclusions of law. Such findings of fact, where the evidence is conflicting, and where the trial court approves the same, are entitled to great respect in an appellate court and carry much weight. Unless manifestly erroneous they will not be disturbed."

See Citations; and further the Court says on page 117:

> "The Bankruptcy Act (Comp. St. Sec. 9587) designates among acts of bankruptcy the transfer while insolvent of any portion of the debtor's property to one or more of his creditors with intent to prefer such creditors over his other creditors. Mere preference is not sufficient. The intent to prefer is an essential of the act of bankruptcy, and such intent is a question of fact to be proven. Persons are presumed to intend the natural consequences of their acts, and if a substantial part of a debtor's property is conveyed to a creditor there is a strong presumption of an intention to prefer and bestow upon him a preference. * * *. The nature of the business transacted and the facts and circumstances of

each particular case are important to be considered in determining such question."

In Wilson Bros. v. Nelson, 103 U. S. 191, 46 Law Ed. 147, a debtor more than a year prior to the filing of the petition in bankruptcy, gave to a creditor an irrevocable power of attorney to confess judgment upon a promissory note after its maturity. Within four months before the filing of the petition in bankruptcy against the debtor, the creditor obtained such a judgment and caused execution to issue thereon. The debtor having failed to within five days before the sale under execution to discharge the judgment or to file a voluntary petition in bankruptcy, the court held that judgment and execution constituted a preference by the debtor within the meaning of the bankruptcy act. It seems clear from the court's action in the above case that the Supreme Court entertains the view that such contracts are executory in character and become operative only as of the date of their fulfillment. The meat of the decision is found in this postulate:

> "The Act of 1898 makes the result obtained by the creditor and not the specific intent of the debtor the essential fact."

The Court's attention is called to the similarity in the cases. Instead of a power of attorney to enter a judgment, the instrument set up on page 236 of the Transcript of Record, if valid, would constitute a power of attorney from the bankrupt to appellant to make a draft upon the general funds in the hands of the Lincoln Mortgage Company. It was not directed to any of the funds, but was to be paid out of any fund that the Lincoln Mortgage Company might have in its hands belong-

ing to the bankrupt. In the case cited above, Wilson v. Nelson, the power of attorney was exercised. In the case at bar the power of attorney, if ever given, was never exercised, for the evidence does not show that any draft was ever made upon the Lincoln Mortgage Company by the appellant and on the contrary it does appear that the bankrupt retained and subsequently exercised a control over the funds and collected the same.

Appellant's appeal and brief are based upon the theory that the payment of $13,000.00 to the appellant was paid under the "assignment" dated March 5, 1929, for $14,196.77. As the instrument does not prove itself, and the payment does not purport to be a payment under the instrument, the circumstances under which the payment was made and the evidence given when it was produced in court, are most important.

On June 6, 1929: The bankrupts made an assignment to Crane Co. (T. R. 574-575) of book accounts and claims of every nature; amount $4725.00. As originally drawn, this instrument was for $4725.00. Afterwards, two items of $500.00 each were erased (T. R. 575). The explanation made (T. R. 576) was that these two items were subsequently paid.

On June 7, 1929: The appellant released all claims to these items amounting to $4725.00 (T. R. 578). The release is to Crane Co., and contains a recitation that it was done after reviewing the "assignment" (T. R. 578).

On June 8, 1929: Lincoln Mortgage Company issued its check to Phoenix Plumbing Co. for ....14,000.00 (T. R. 600 to 603, inc.).

On June 11, 1929: A charge appears to appellant on books of bankrupt of ....$13,000.00 (T. R. 626).

On ~~*June*~~ July 11, 1929: This item appears on books of appellant as a credit to bankrupt (T. R. 594) for $13,000.00

The context in the testimony of Mr. Nihel shows that there was no mistake as to date. The two preceding items on July 6th of $11.72, and July 7th, of $200.00, and the next payment after that of the bankrupt shown on books of appellant as of July 26th, amount of $71.22 (T. R. 594).

Why appellant held the cashier's check for $13,000.00 *for one month without crediting on its books does not appear in the evidence anywhere.*

The foregoing clearly indicates that appellant intervenor, and bankrupt, acted in collusion in depriving the bankrupt of $17,725.00 of live assets, leaving nothing for unsecured creditors or for carrying out of building contracts, or carrying on the business.

From the above it will be seen that all of the available assets were transferred by this payment of cash to the appellant, and the transfer of book accounts and contracts to Crane Co., within the period commencing June 6, 1929, and ending June 11, 1929; that the bankrupts or anyone else at all familiar with the affairs of the bankrupt could fail to see that this must result in the failure of the Phoenix Plumbing and Heating Company, and that the estate would be depleted so that these two creditors would receive more than their fair share of the assets

of the corporation; that they took these assignments and payments with the knowledge upon the part of the bankrupts that it would have this effect, and that the intentions of the bankrupts to make a preferential transfer are so clear from this and the preceding evidence that we do not deem further argument upon this necessary.

As we have heretofore pointed out, the only testimony as to the execution of the alleged assignment of March 5, 1929, including the delivery thereof, comes from the lips of one of the bankrupts, whose veracity has been so thoroughly impeached in the testimony upon partnership and assignments by documentary evidence and the testimony of witnesses of standing that we do not believe that the Court would hold that the Master was bound to believe the testimony of this bankrupt (Dee Francis), especially so as it is contradicted by all the circumstances surrounding the payment of the above sum of $13,000.00 to the appellant, and the circumstances surrounding the delivery of the check of the Lincoln Mortgage Company for $14,000.00 to the bankrupt.

Were it conceivable that the Court could find this evidence sufficient to establish the delivery of the instrument to the appellant by the bankrupt, as testified to by Dee Francis in the face of the failure of the manager of the appellant corporation to so testify while he was on the stand, we would still face the fact of the concealment of this transfer and the payment of the money on the 10th day of June, 1929.

When we consider that the bankrupt partnership was borrowing money from the bank with which to pay its payrolls, and that on each application the manager of the partnership denied that any assignments were being made; that upon the list of contracts furnished the bank

at its request to show what funds would be available to pay loans theretofore furnished the bankrupt, and other sums which they were attempting to borrow, and did borrow, and that this instrument, Petitioners' Exhibit No. 27 (T. R. 203 to 205, inc.) indicates a balance due of $90,235.58, and no assignments mentioned therein, although at the time the same was furnished to the bank the appellant herein was in the possession of various alleged assignments, the concealment of these assignments by Dee Francis from Mr. McNichol, the executive officer of the Commercial National Bank, was made at a time when it was his duty to speak, and comes within the rule laid down by Mr. Justice Brandeis in Benedict v. Ratner, 69 Law Ed. 991, and in many other cases in which it is pointed out that secret assignments and the retention of dominion over the funds alleged to be assigned by the bankrupt imputes fraud, and, as said in that case the delivery of a list of accounts was inoperative to perfect a lien, and was an unlawful preference. In the same case the Court says that this reservation does not raise a presumption of fraud; it imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and creation of a lien.

The above decision was rendered in a bankruptcy matter arising in the State of New York, but we do not think that the statutes there in any way change the general law upon the subject as applicable in other parts of the United States.

Connecting this concealment on the part of Dee Francis when it was his duty to speak with the fact that the manager of the appellant corporation made no mention thereof in the various conferences at the bank, the purpose of which conferences was to secure funds for

the continuance of the business and the payment of the payrolls, we think that the duty to speak was alike upon the appellant and upon the bankrupt.

The form of the instrument, so different from that of the other "assignments" set up in record, particularly those to the appellant, indicates that a stranger hand was working. If the appellant was the bona fide holder of the instrument, it is inconceivable to us that Mr. Nihel, being upon the stand, and his own attorney being there and conducting the examination, should not of himself testify to its delivery and to the circumstances surrounding its delivery, if any such delivery there were, and that he would produce records from his own office showing the acceptance thereof, and that if it had been accepted by the Lincoln Mortgage Company, or if any drafts had been made upon the Lincoln Mortgage Company in accordance with the terms of the instrument of March 5th, 1929, he would have testified to such facts.

Moreover, it is inconceivable to the attorneys for the appellees that the diligent, capable, and learned attorneys for the appellant should not have produced officers from the Lincoln Mortgage Company to testify as to the acceptance of the instrument by them and the circumstances under which such instrument was made, and if any drafts were made in accordance with its terms, that they would not have, by proper process brought these instruments into Court.

It is also inconceivable to us that he would not have cross-examined Dorothy Dorrell, who produced the voucher check of the Lincoln Mortgage Company to the bankrupt for $14,000.00, and testified in regard thereto upon the stand (T. R. 599). She testified that she was

the custodian of certain papers and canceled checks of the Lincoln Mortgage Company; that she was employed by it, doing special bookkeeping, and that she had this check in her possession and produced it in court. Certainly, if it had been in payment of an accepted assignment, or of any assignment, the capable counsel of the appellant would have, on cross-examination of this young lady, elicited that fact, and have had her to bring such assignments into court, and certainly, if there were not reason for the concealment of the payment of $13,000.00 to the appellant on or about June 10, 1929, the check of the Citizens State Bank would not have been held by appellant without an entry upon their books until July 11, 1929, one month after its receipt.

These facts are not consistent with open and fair dealings or with a recognition of the rights of unsecured creditors and of banks that are furnishing the money for payrolls to continue a business that was confessedly bankrupt.

SUMMARY

To sum up the points of this argument, we wish to point out that the evidence clearly shows:

1. That the bankrupts started business about October 5, 1927, with a capital not to exceed $1,000.00, and probably not to exceed $700.00;

2. That within ten days after the purchase of the business of William Remsbottom on October 5, 1927, this original capital had been exhausted in preliminary expenses and the purchase of a good will that was of no value to their future business, and that they were actually insolvent on October 15, 1927;

3. That while so insolvent they, on that date, issued a financial statement to obtain credit, in which they made a claim of a net worth of $4,844.54 (T. R. 83); that this result was obtained by valuing that which they purchased for $3600.00, at $7256.00, and omitting liabilities of at least $1900.00 from said financial statement.

This statement, if true, would have shown a net profit of nearly 400 per cent in ten days' time.

4. That after their insolvency had been increased by a further loss of $3700.00 (T. R. 344) they, on April 2, 1928, at a time when their liabilities exceeded their assets in a sum of not less than $4000.00, issued a statement (T. R. 86, 87, 88) in which they showed a net worth of $12,127.80; that if this statement had been correct, it would have shown a gain of 1100 per cent on the original capital invested in six months time.

5. That these figures were arrived at by adding the value of salable merchandise on hand and listing as assets building contracts in the sum of $19,012.10 (T. R. 86), regardless of whether work had been commenced thereon or whether any materials or labor had been furnished therefor, or of whether or not the contracts were taken at a profit or a loss.

6. That on May 31, 1928, while still insolvent, they prepared a purported statement of assets and liabilities (T. R. 89, 90, 91), which, on August 18, 1928, was furnished to R. G. Dun and Co., as a basis for credit, this statement showing a net worth of $15,236.55, or a profit of more than $3000.00, or 300 per cent on the original capital in a period of 59 days.

The result shown in this statement was obtained in the usual manner, by suppressing liabilities and listing

as assets contracts which in no sense of the term could be called assets; that upon the false statement they were able to procure a good credit rating from R. G. Dun and Co. (G-3), and thus incur large liabilities (T. R. 91).

7. That on April 30, 1929, the report of a certified public accountant shows that their liabilities exceeded their assets by $30,165.82 (T. R. 197-198), and that the report of this same certified public accountant shows that this excess of liabilities over assets had increased at the date of the filing of the petitioning creditors' petition to $43,716.06 (T. R. 196); that the accuracy of this statement is shown by the schedules of the bankrupt filed herein (T. R. 290 to 334, inc.);

8. That intervening statements made up by creditors, including the Commercial National Bank, showed the insolvency of the bankrupts;

9. That the bankrupt firm was drained of a large proportion of its assets between the dates, January 1, 1929, and April 21, 1929, and that between these dates important books of the bankrupt firm disappeared, including a cash book covering that period, and that on April 21, 1929, an incendiary fire took place upon the premises, and from that time on many records have been inaccessible, and that Dee Francis was on the premises between nine and nine-thirty on the night of the fire, according to his own statement, and the testimony of the police officers shows that the fire occurred a little later that night, after the candle attached to the fuse had burned down;

10. That for approximately sixty days prior to the appointment of a Receiver in bankruptcy, no deposits were made in the bank by the bankrupt firm;

11. That the bankrupts kept no books from which their financial transactions and condition could be ascertained;

12. That subsequent to the incendiary fire on April 21st, other large sums were disbursed by the bankrupt and no satisfactory accounting therefor was made, and the same do not appear to have been used for the payment of debts of the bankrupt;

13. That if the alleged assignment of March 5, 1929, was ever executed, the fact of its execution was suppressed, and actively concealed from one of the creditors, the Commercial National Bank, and that by virtue of said concealment, loans of money were obtained from the bank, all this occurring in the spring of 1929;

14. That no notice was given to any creditors of the bankrupt of the alleged assignment of moneys due on the various contracts of the bankrupt;

15. That the bankrupts knew of their insolvency, and knew that the payment of the said $13,000.00, together with the transfers made to Crane Co. between the dates June 5th and June 11th, of 1929, would result in a preference in the depletion of the estate, and in these creditors obtaining a larger percentage of the assets of the bankrupt than would other creditors of the same class, and that, knowing this, they made these transfers with the intent to prefer the Crane Co. and the Standard Sanitary Manufacturing Company;

16. That there is no testimony worthy of belief that the said instrument dated March 5, 1928, was ever executed (or delivered) or that the same was ever accepted by the Lincoln Mortgage Company, or that the bankrupt ever relinquished any control over the fund due it from the

Lincoln Mortgage Company, and that, on the contrary, no payment was made under said instrument, but was made direct to the bankrupts by the Lincoln Mortgage Company, and that after the receipt, the bankrupts exercised dominion over the fund.

17. That all the parties to these transfers knew that the effect of these payments on the dates between June 5th and June 11th, inclusive, would be to deprive the bankrupt of all of its available capital, leaving nothing for the general creditors, work a preferential transfer, and force the closing of the business, unless money could be obtained from the bank to provide for payrolls;

18. That the various instruments purported to be assignments theretofore concealed from the creditors by bankrupt were brought to light and precipitated the filing of the petition in bankruptcy, when Mr. Fred Blair Townsend was employed to procure an assignment for the benefit of creditors, and conferences were held with Messrs. Nihel, Duffy, Armstrong, and Townsend (T. R. 612).

IN CONCLUSION

We submit that the decree of the District Court rendered in this matter should be affirmed, and the adjudication in bankruptcy confirmed; that the report of the Special Master upon which it is founded, contains ample findings of facts to sustain the Master's conclusions of law, and that all of these findings of facts were sustained by competent evidence;

That only upon one question is there any conflict in the testimony upon any material issue, and that is as

to the execution and delivery of the instrument dated March 5, 1929, and which purports to be an assignment of contracts or debts due the bankrupt, and that the testimony given by this witness conflicts with all the facts and circumstances of the case; that the records demonstrate that he is unworthy of belief, and that all of his evidence is contained in the four "yes" answers, in answer to leading questions of counsel for appellant.

The appellant concedes that the adjudication of bankruptcy should stand.

We submit that the order appealed from is not an appealable order under Section 25 of the Bankruptcy Act, and that no appeal has been allowed by the Circuit Court of Appeals under the provisions of Section 24 of the Bankruptcy Act, even if such an order were appealable thereunder.

Respectfully submitted,

Thomas W. Nealon,
Attorney for Appellee, William L. Hart, Trustee in Bankruptcy.

Alice M. Birdsall,
Attorney for Appellees, Petitioning Creditors.

APPENDIX

Arizona statutes on Bills and Acceptance thereof as assignments.

Revised Code of Arizona, 1928:

"*Section* 2429. *Bill not an assignment of funds; acceptance necessary.* A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same."

"*Section* 2433. *Acceptance; how made.* The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money."